Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

JAN CASEY,

Petitioner,

v.

ARIZONA MAIL ORDER,

Respondent.

INDUSTRIAL COMMISSION OF ARIZONA/
LIBERTY MUTUAL INSURANCE COMPANY,

Respondent Party in Interest.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona Division 2

PETITION FOR WRIT OF CERTIORARI

BERNARD I. RABINOVITZ
721 N. 4th Avenue
Tucson, AZ 85705
Tel. (520) 624-5526
1-800-365-0821
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

95pp

QUESTIONS PRESENTED

I. Whether the *Due Process Clause* of the *Fourteenth Amendment to the United States Constitution* was violated where workers compensation benefits awarded in a final decision of an administrative law judge were retroactively terminated prior to the date of the administrative law judge decision?

II. Whether the Decision of the Arizona Court of Appeals Violates the *Equal Protection and Due Process Clause of the Fourteenth Amendment of the U.S. Constitution* by Declaring Moot a Denial of Due Process of Law Due to a Subsequent Payment of Benefits Three Years Later?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Jan Casey, Arizona Mail Order, Industrial Commission of Arizona, and Liberty Mutual Insurance Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jan Casey requests that a writ of certiorari issue to review the order of the Court of Appeals of the State of Arizona, Division 2, to which a Petition for Review was denied by the Supreme Court of the State of Arizona.

OPINIONS BELOW

The final order of the Supreme Court of Arizona dated June 26, 1997, denying review, is unpublished and is reproduced in the Appendix ("App.") at B1. The opinion of the Court of Appeals of the State of Arizona, Division 2, dated January 21, 1997, is an unpublished Memorandum Decision, and is reproduced at App. A1. The Decision Upon Hearing and Findings and Award of the Industrial Commission of Arizona dated May 20, 1996, is unpublished and is reproduced at App. C1. The earlier Decision of the Industrial Commission of Arizona dated October 11, 1994 is unpublished and is reproduced at App. D1.

JURISDICTION

On June 26, 1997, the Arizona Supreme Court denied review of the Court of Appeals' Decision, thereby upholding the validity of that Decision. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a).

PRESERVATION OF CONSTITUTIONAL ISSUES BELOW

Petitioner herein raised the issues of violation of the Doctrines of Res Judicata and Issue Preclusion by retroactively terminating benefits contrary to a final Administrative Law Judge Decision as early as the initial Request for Hearing filed before the Industrial Commission of Arizona on the 25th day of April, 1995. Also alleged at that time was bad faith and improper claims handling as a result of said retroactive termination of benefits and a claim was asserted for imposition of interest and attorney fees.

On September 5, 1995, Industrial Commission Administrative Law Judge Bill Enriquez issued a Memorandum stating that the parties "will submit legal memoranda regarding whether a defendant carrier can close a claim retroactively to the issuance of a decision by the Industrial Commission of Arizona". These issues were addressed in a Memorandum filed by Petitioner on the 8th of September, 1995.

On June 19, 1996, a Request for Review was filed in the Industrial Commission of Arizona, again alleging the impropriety of the retroactive termination of benefits, bad faith, issue preclusion, and failure of the Administrative Law Judge to dispose of these issues in his decision.

On pages 26 and 27 of the Opening Brief in the State Court of Appeals, the Petitioner again raised the issues of violation of the Doctrine of Res Judicata, Issue Preclusion, Bad Faith, and the refusal to make specific findings with regard to these issues, and the following specific allegation was made: "Judge Enriquez allowing relitigation of

the precluded matters constituted reversible error and denied Petitioner due process of law guaranteed by *United States and Arizona Constitutions.*" See *Landgraff v. Wagner,* 26 Ariz. App. 409, 54-55, 546 P.2d 26 (1976). Petitioner's Opening Brief in the Court of Appeals of the State of Arizona, at pp. 26, 27. See (App. H1) Additionally, on page 9 of the Reply Brief before the Court of Appeals of the State of Arizona, the following statement is made:

> Petitioner has now spent three years fighting both her debilitating ailments and the Respondents who have engaged in a pattern of finding new ways to deprive Petitioner of her constitutionally entitled benefits. Judge Enriquez, by allowing Respondents to revisit the res judicata award of Judge Israel extended the delay and encouraged further litigation. Further, the Administrative Law Judge, by failing to address most of the critical issues that were properly before him, has violated Arizona Law and Petitioner's due process rights under both the *United States and Arizona Constitutions* . . . Any system that determines a payment of benefits at the whim of the carrier must not be condoned by this Honorable Court. Not only would this procedure deny Petitioner due process of law as guaranteed by the *State and Federal Constitutions,* it would also violate the spirit and intent of the Workers' Compensation Act . . .

(Petitioner's Reply Brief, pp. 9, 10)

Finally, the constitutional issues were again preserved in the Petition for Review before the Arizona Supreme Court specifically at pp. 6, 7, 8, 12 and 15 thereof. (App. J1)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, § 1 to the Constitution of the United States provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article 2, § 4 of the *Constitution of Arizona* provides:

> No person shall be deprived of life, liberty, or property without due process of law.

Article 18, § 8 of the *Constitution of Arizona* provides:

> The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the Legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care, or

to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer or any person employed by said employer, acting in the scope of his employment, as provided by this Constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefore, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury, except that if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such employee may, after the injury, exercise the option to accept compensation or to retain the right to sue the person who injured him.

A.R.S. § 23-1044 (A) provides,

For temporary partial disability there shall be paid *during the period thereof* sixty-six and two thirds per cent of the difference between the wages earned before the injury and the wages

which the injured person is able earn thereafter . . .

A.R.S. § 23-1045 provides that,

A. temporary total disability the following compensation shall be paid:

1. . . . Sixty-six and two-thirds per cent of the average monthly wage shall be paid *during the period of disability* . . . [emphasis ours]

STATEMENT OF THE CASE

On *October 11, 1994,* following a hotly contested compensability hearing, Arizona Industrial Commission Administrative Law Judge Gary Israel found that Petitioner had sustained a compensable chronic fatigue/Epstein-Barr fibromyalgia gradual on the job physical injury which was an aggravation of a pre-existing condition culminating on *December 13, 1991.* She was held entitled to continuing medical and temporary partial and/or temporary total disability compensation benefits from December 13, 1991 until such time as her condition may become stationary (see App. D1). This award became final without requests for review or appeal.

The Respondent Carrier subsequently, on *March 15, 1995,* issued a Notice of Claim Status awarding compensation and medical benefits from December 13, 1991 only through *November 11, 1993* and closing the case with no permanent disability (see App. E1). On or about April 25, 1995, Petitioner filed a Request for Hearing and for A.R.S.

§ 23-1061(J) relief, alleging an improper retroactive termination of benefits and alleging bad faith and improper claims handling (see App. K1).

Pursuant to Petitioner's request, hearings were held on September 20, 1995, November 11, 1995, and April 10, 1996 before Administrative Law Judge Bill Enriquez in Tucson, Arizona. On May 20, 1996, Administrative Law Judge Enriquez issued a Decision Upon Hearing and Findings and Award For Temporary Disability Benefits (see App. C1).

On June 19, 1996, Petitioner filed a timely Request for Review, followed by a timely response thereto, and, on July 22, 1996, the Administrative Law Judge issued a Decision Upon Review Affirming Decision Upon Hearing and Findings and Award For Temporary Disability Benefits. (App. F1)

On August 20, 1996, Petitioner filed a timely Petition for Special Action – Industrial Commission before Division Two of the Arizona Court of Appeals, resulting in a Memorandum Decision affirming the Awards below. (App. A1)

Petitioner filed a timely Petition for Review in the Arizona Supreme Court (App. J1). Review was denied by the Arizona Supreme Court on June 26, 1997. (App. B1) A mandate issued from the Arizona Court of Appeals on the 31st day of July, 1997. (App. G1)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ARIZONA COURT OF APPEALS VIOLATES THE DUE PROCESS CLAUSE OF THE *FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION* AND AMOUNTS TO AN UNCONSTITUTIONAL TAKING OF PROPERTY BY RETROACTIVELY TERMINATING WORKERS' COMPENSATION TEMPORARY DISABILITY BENEFITS CONTRARY TO A FINAL AWARD.

The Fourteenth Amendment states, " . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " The Arizona Court of Appeals, and the Arizona Supreme Court by allowing the Court of Appeals' decision to stand, have in essence permitted benefits under the *Arizona Worker's Compensation Act* to be retroactively denied Petitioner following the finality of an Administrative Law Judge Decision entitling her to continuing compensation and medical benefits. Violation of the Doctrines of Res Judicata and Issue Preclusion have been held to be so fundamentally unfair as to abridge the constitutional right to due process of law. *Sotomura v. County of Hawaii, et al.*, 460 F.Supp. 473, 482 (1978), *United States v. Moser*, 266 U.S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924), *Southern Pacific Railroad Company v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897).

It has been held that the guarantee of due process applies to proceedings in workers' compensation cases. *Phillips v. Mathews*, D.C.Va., 412 F.Supp. 238 (1976).

The refusal of the state court to apply res judicata in a case of direct, actual, and irreparable loss of property, must be said to be so fundamentally unfair as to abridge the owner's constitutional right to due process of law. *Sotomura v. County of Hawaii*, supra.

The Arizona Court of Appeals had earlier held in *Noble v. Industrial Commission*, 140 Ariz. 571, 574, 683 P.2d 1173, 1176 (App. 1984), that issue preclusion extends to final intermediate determinations, specifically claim preclusion was applied in a case involving attempted retroactive modification of a final determination at a subsequent claim stage. Yet here the State Court has refused to apply its own law.

Other jurisdictions have resolved similar issues as prayed for here. In *Visintin v. Workmen's Compensation Appeal Board*, 127 Pa.C 244, 248, 561 A.2d 372, 377 (1989); the Pennsylvania Court was confronted with the practice of a previously fixed partial disability compensation award being reviewed and altered retroactively to a date prior to the referee's decision. The Court found that res judicata applied to such an unappealed decision. " . . . [A]n adjudication including a finding is final and controlling as of the date of the finding and such determination is conclusive upon the parties, and not subject to alteration based upon a change in the theory as to the essential nature of the inquiry."

In the Oregon case of *Parker v. D.R. Johnson Lumber Co.*, 93 Or. App. 675, 763 P.2d 1194 (Or. App. 1988), the practice herein appealed again arose. The factual situation is remarkably similar to the instant matter.

The Workers' Compensation Board in *Parker*, supra, awarded total temporary disability through the date of the award with no specific period of benefits after that date. The carrier attempted a retroactive termination of those benefits. The Oregon Court of Appeals found that although the duration of the claimant's temporary disability was undetermined at the time of the award, it could be *inferred* that the order extended beyond the date of the award. The Appeals Court then addressed the matter of penalties and attorney fees for late payment awarding same to the claimant. Similar practices and situations have developed in numerous other jurisdictions. *Johnson v. Aetna Life & Cas. Co.*, (N.H.) 131 N.H. 698, 559 A.2d 838 (1989); *Koch v. Frieden*, (Neb.) 228 Neb. 328, 422 N.W.2d 354 (1988); *Nelson v. Holtzclaw*, (Fl.) 566 So.2d 307 (1990); *Rightnour v. Kore-More, Inc.*, (Montana) 236 Mont. 108, 768 P.2d 871 (1989).

Conflicting decisions are represented by *Gusler v. Fairview Tubulor Products*, (Michigan) 412 Mich. 270, 315 N.W.2d 388 (1981); *Miller v. Pool & Canfield, Inc.*, (Missouri), 800 S.W.2d 120 (1990) and *K&L Trucking Co. v. Thurber*, (Virginia) 1 Va App. 213, 337 S.E.2d 299 (1985). These are only a partial illustrative listing of the, often times, conflicting decisions among the various states. As found in *Commissioner v. Bilder*, 369 U.S. 499, 501, 82 S.Ct. 881, 8 L.Ed.2d 65 (1962) there is a need for "uniformity of decisions", and "a uniform rule" is needed upon such an important and recurring issue. The number of times this issue has arisen indicates the likelihood of further repetitions of this practice.

This Honorable Court has squarely before it the issue of whether an employer or carrier in a worker's compensation setting can retroactively terminate benefits awarded by a final fully litigated award without doing violence to the due process clause of the *United States Constitution*. Petitioner asserts the answer is an emphatic "No!".

For the reasons cited above, Petitioner prays this Honorable Court to grant her petition, and review a situation where constitutional rights have been denied by a state agency, the Industrial Commission of Arizona, that are guaranteed by the *Constitution of the United States of America*.

In requesting that this Honorable Court grant her relief, Petitioner asks not only on her behalf, but on behalf of those similarly situated in other jurisdictions as well, whose rights will likely be trampled upon unless this Honorable Court speaks to this important and continuing issue. As stated early on, this scenario does not represent an isolated occurrence, but a continuing theme indicative of design.

The foregoing reasons for granting the Petition for Writ of Certiorari were argued here first to lay the foundation for what the Petitioner feels may be more egregious error as the Decisions of the State appellate courts, in effect, have held that a denial of due process of law can be rendered moot by way of a subsequent repayment of the benefits wrongfully denied at the point that the same were due and owing.

II.

THE DECISION OF THE ARIZONA COURT OF APPEALS VIOLATES THE *EQUAL PROTECTION AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT* OF THE U.S. CONSTITUTION BY DECLARING THE DENIAL OF DUE PROCESS WAS RENDERED MOOT BY A SUBSEQUENT PAYMENT OF BENEFITS THREE YEARS LATER.

The statement by the Arizona Court of Appeals to that effect betrays a basic lack of understanding on the part of that Court of the due process clauses of both the *Arizona* and the *United States Constitutions*.

The Respondent Carrier's payment of previously denied compensation benefits after the date that the Petitioner's Opening Brief was filed in the Arizona Court of Appeals, if it is relevant at all, would only amount to a judicial admission of wrongdoing by previously denying payment of the benefits when they should have been paid. The denial of due process of law has tainted every aspect of this case, and by setting aside the awards below, this Honorable Court will permit the ultimate trier of fact, upon remand, to become aware that the carrier did pay benefits, all the while denying their obligation to do so. This turn of events did not occur within the record of the Industrial commission. The Award of May 20, 1996 extended temporary compensation to November 28, 1995, and payment was made when the Opening Brief was filed.

This late payment of benefits, previously retroactively denied, did not make up for the three plus years that the Petitioner went without compensation benefits

and medical treatment at a time that she should have received such benefits per Arizona statutes. Respondents have openly and without remorse ignored the provisions of A.R.S. § 23-1044 and 1045.

Again, rather than making the denial of due process of law argument moot, the subsequent payment highlighted the fact that the entitlement to worker's compensation benefits should not be a matter of whim on the part of the carrier to pick and choose when it will follow adjudicated decisions of the administrative agency. It does not lie within the power of a State Court to declare violations of the Due Process Clause of the U.S. Constitution moot!

A constitutional issue may be determined regardless of its alleged mootness if it involves an issue or practice which is capable of repetition, yet evading review. *First National Bank of Boston v. Bellotli*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *rehearing denied*, 438 U.S. 907, 98 S.Ct 3126, 57 L.Ed.2d 150 (1978); *DiIulio v. Board of Fire and Police Commissioner of City of Northlake*, C.A. Ill., 682 F.2d 666 (1982).

Similar to the instant matter is *Harris v. Bailey*, D.C. Va., 52 F.Supp. 562 (1981), *reversed in part on other grounds*, 675 F.2d 614 (1982), *on remand*, 574 F.Supp. 966 (1983) wherein the Petitioner had social security funds taken by garnishment which were subsequently returned. The Court found that the subsequent return of the funds did not make the practice and the matter moot. It was found that the practice was capable of repetition while evading review.

Similarly, Petitioner's briefs to the lower courts directed the Courts' attention to the escalating nature of this wrongful practice of workers' compensation carriers retroactively denying finally awarded benefits and later making payment after the matter reaches the Appellate courts. This is exactly the situation that has occurred in the instant case. These practices and procedures violated constitutional rights to due process under the 14th Amendment, therefore cannot be moot notwithstanding the later payment. Numerous jurisdictions, including Federal, support Petitioner's position.

Valentine v. Secretary of Health & Human Services, D.C. Cal. 542 F.Supp. 76 (1982); *Fitzgerald v. Porter Memorial Hospital*, CA Ind. 523 F.2d 716 (1975), *cert. denied*, 425 U.S. 916, 96 S.Ct. 1518, 47 L.Ed.2d 768 (1976); *Warren v. Harvey*, D.C. Conn. 472 F.Supp. 1061 (1979), *affirmed*, 632 F.2d 925 (1980); *cert. denied*, 449 U.S. 902, 101 S.Ct 273, 66 L.Ed.2d 133 (1980).

Respondents have thus far avoided Petitioner's request for interest attorney's fees and bad faith allegations. These issues were never addressed below because of the mootness claim. Mootness is not found where only one of several issues may have become moot. *Danzy v. Johnson*, D.C. Pa., 417 F.Supp. 426, *affirmed*, 582 F.2d 1273; *Roy v. Cohen*, D.C. Pa, 590 F.Supp. 600.

The right to social services and benefits, particularly state constitutionally mandated benefits such as workers' compensation, is of great public importance. *Theriault v. Brennan*, 488 F.Supp. 286 (1980), *affirmed*, 641 F.2d 28 (1981) wherein the plaintiffs claimed that an official's failure to provide emergency energy assistance to eligible

applicants was a violation of constitutional rights and was not moot, even though the named plaintiffs had *subsequently received all benefits,* to which they were entitled. It was further held that the matter was *not moot* where a continuing request for subsequent assistance as contemplated and it was alleged that officials would employ the challanged practice if and when the opportunity arose.

The Petitioner respectfully prays this Honorable Court to grant her Petition for Writ of Certiorari to reinforce that the *Constitution of the United States of America* shall not be subject to the whim of those who manipulate the entitlements of those less fortunate. Those whose very existence depends upon the finality of adjudicated decisions should be entitled to timely receive the benefits that the framers of the *Arizona Constitution* envisioned to be a protected class, having traded their rights to litigation against their employer for the implementation of a just and humane *Workers' Compensation Act*. It cannot lie with the State Court to declare moot this denial of Federal Due Process of Law. It now remains for the highest court of this land to preserve and protect the rights of its citizens as guaranteed by the *Constitution* it has sworn to defend.

CONCLUSION

Petitioner has been denied due process of law by the retroactive termination of her workers' compensation benefits previously awarded by a final decision on the merits. Petitioner's Due Process rights were further denied by the State Court treating this constitutional

deprivation as having become moot by subsequent payment.

For the foregoing reasons, Petitioner respectfully submits that this Honorable Court should grant her Petition for Writ of Certiorari to review the decision of the Court of Appeals of the State of Arizona.

WHEREFORE, Petitioner prays that her Petition be granted, that the Awards below be set aside, that she be awarded her costs, a reasonable attorney's fee and such other and further relief as the Court deems proper.

RESPECTFULLY SUBMITTED this 24 day of September, 1997.

BERNARD I. RABINOVITZ
Attorney for Petitioner

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAN R. CASEY,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

ARIZONA MAIL ORDER,
Respondent Employer,

LIBERTY MUTUAL,
Respondent Insurance Carrier.

2 CA-IC 96-0032
DEPARTMENT B
MEMORANDUM DECISION
Not for Publication
Rule 28(a)(2),
Rules of Civil
Appellate Procedure
(Filed Jan. 21, 1997)

Special Action – Industrial Commission

ICA Claim No. 92352-252049

Carrier No. C609-085340

Administrative Law Judges Gary M. Israel and Bill H. Enriquez

AWARD AFFIRMED

Rabinovitz & Associates
by BERNARD I. RABINOVITZ — Tucson
Attorneys for Petitioner Employee

Anita R. Valainis, Chief Counsel — Phoenix
Industrial Commission of Arizona
Attorney for Respondent

Cross & Lieberman
by Donald L. Cross and Lisa M. Ashbrook
Phoenix

Attorneys for Respondent Employer
and Respondent Insurance Carrier

LIVERMORE, Judge.

From 1987 through 1991, Jan Casey worked as the creative director for Arizona Mail Order. Due to the stressful and demanding nature of her job, the chronic fatigue syndrome with which she had been diagnosed in 1986 worsened until she found it necessary, in late 1991, to take a medical leave from work. She has not returned to work since.

In December 1992, Casey filed a workers' compensation claim for a gradual stress injury and aggravation of the preexisting chronic fatigue syndrome. After the claim was denied, a series of hearings were held from November 1993 through June 1994. On October 11, 1994, the administrative law judge (ALJ) issued an award for a compensable claim.

On March 15, 1995, the carrier issued a notice closing the claim effective November 11, 1993. Casey then requested a hearing pursuant to A.R.S. § 23-1061(J), alleging that the carrier had improperly closed the case retroactively. More hearings were held, culminating in a second award issued May 20, 1996, which extended benefits though November 28, 1995. Despite the favorable result, Casey requested administrative review of the award, which was summarily affirmed, and now requests special action review by this court. We, in turn, affirm.

Casey's contention that the carrier acted in bad faith by closing her claim effective November 1993 based on a medical examination which antedated the October 1994 award is without merit. The only issue the ALJ decided in that award was compensability; whether and when Casey's condition was stationary and whether she had a permanent disability were not at issue and, thus, were not decided. Casey's further arguments about the carrier's termination of benefits effective November 11, 1993, were made moot by the second award, which extended benefits through November 28, 1995.

The award of May 20, 1996, which adopted November 28, 1995, as the stationary date and found no permanent disability is fully supported by the evidence. The ALJ adopted the testimony of Dr. J. Steven Strong, a specialist in internal medicine and rheumatology, over that of Dr. Brian Cabin, a specialist in chronic fatigue syndrome. Dr. Strong testified that "referable to the aggravation of her work, I think that condition is stationary." He further testified that, although she had "persistent changes" since the earlier award, "they don't seem to be getting any worse, they don't seem to be getting any better, they seem to be staying about the same." Asked whether she had any impairment of function due to stress at work, Dr. Strong responded: "Impairment of function, meaning does she have any long-term deformities, or inability to function mechanically with her body, or intellectually, the carry[ing] on her daily life requirements of decision making, check writing and managing her own personal requirements, I think she can do all right with that."

Award affirmed.

/s/ Joseph M. Livermore
JOSEPH M. LIVERMORE, Judge

CONCURRING:

/s/ William E. Druke,
WILLIAM E. DRUKE, Chief Judge

/s/ John Pelander
JOHN PELANDER, Presiding Judge

APPENDIX B

[SEAL]

Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

June 26, 1997

RE: JAN R. CASEY vs. INDUSTRIAL COMM OF AZ/ ARIZONA MAIL ORDER/LIBERTY MUTUAL
Supreme Court No. CV-97-0126-PR
Court of Appeals No. 2 CA-IC 96-0032
Industrial Commission No. 92352-252049 / Carrier No. C609-085340

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 24, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Feldman recused himself and did not participate in the determination of this matter.

Record returned to Court of Appeals, Division Two, Tucson, this 26th day of June, 1997.

NOEL K. DESSAINT, Clerk

TO:
Bernard I. Rabinovitz, Esq., Rabinovitz & Associates
Anita R. Valainis, Esq., Chief Counsel Industrial Commission of Arizona
Donald L. Cross, Esq. and Lisa M. Ashbrook, Esq., Cross & Lieberman Pa
Joyce Goldsmith, Clerk, Court of appeals, Division Two, Tucson
Lexis-Nexis
West Publishing Company

jdm

APPENDIX C

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

JAN R. CASEY, Applicant, vs. ARIZONA MAIL ORDER, Defendant Employer, LIBERTY MUTUAL INSURANCE, Defendant Insurance Carrier.	ICA CLAIM NO. 92352-252049 SOC. SECURITY NO. 497-46-0745 CARRIER CLAIM NO. C609-085340 DATE OF INJURY: 12/13/91 **DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS**

On May 20, 1996, the undersigned Administrative Law Judge entered a DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS. On June 19, 1996, counsel for the applicant filed a REQUEST FOR REVIEW. On July 8, 1996, counsel for the defendants filed an RESPONSE TO REQUEST FOR REVIEW.

The undersigned Administrative Law Judge, having fully reconsidered the file, record and all matters hereunto appertaining, now enters this DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS as follows:

FINDINGS

The DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS entered on May 20, 1996, is fully supported by the evidence and is, hereby, affirmed.

JAN R. CASEY

AWARD

IT **IS HEREBY ORDERED** that the DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS entered on May 20, 1996, be, and the same is, hereby, affirmed.

NOTICE: Any party dissatisfied with this Decision Upon Review may apply to the Court of appeals of the State of Arizona, Division One, for a review of the lawfulness of this Decision pursuant to the provisions of *Arizona Revised Statutes*, §§ 23-951 A and 12-120.21 B. See also *Rule* 10, *Rules of Procedure for Special Actions, Arizona Revised Statutes*, 17 A. Unless such application is made within **THIRTY (30) DAYS** after the mailing hereof, this Decision shall be final. *Arizona Revised Statutes* § 23-943 H.

By /s/ Bill H. Enriquez
BILL H. ENRIQUEZ
Administrative Law Judge

BHE:mje
DATED AND MAILED IN TUCSON, ARIZONA THIS 22ND DAY OF JULY 1996.

APPENDIX D

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

JAN R. CASEY Applicant, vs. ARIZONA MAIL ORDER Defendant Employer, LIBERTY MUTUAL Defendant Insurance Carrier.	ICA CLAIM NO. 92352-252049 SOCIAL SECURITY NO. 497-46-0745 CARRIER CLAIM NO. UNASSIGNED DATE OF INJURY: 12/13/91 **DECISION UPON HEARING AND FINDINGS AND AWARD FOR COMPENSABLE CLAIM**

On December 11, 1992, the applicant filed a claim for worker's compensation benefits for a gradual injury allegedly sustained while working for the defendant employer on December 13, 1991. The defendant carrier denied this claim by NOTICE OF CLAIM STATUS issued June 24, 1993. The applicant protested this Notice by REQUEST FOR HEARING filed July 6, 1993. Pursuant thereto, formal hearings were held in Tucson, Arizona on November 24, 1993, December 22, 1993, March 23, 1994, April 5, 1994 and June 27, 1994.

The applicant is represented by attorney Bernard I. Rabinovitz. The defendants are represented by attorney Donald L. Cross.

The undersigned, having fully considered the files, records and all matters hereunto appertaining, now enters Findings and Award as follows:

FINDINGS

1. The applicant alleges that on and before December 13, 1991, she sustained a gradual stress injury and aggravation of her preexisting chronic fatigue syndrome while working as a creative director for the defendant employer. On December 13, 1991, and at all times relevant to this Decision, the defendant employer was subject to the Workers' Compensation Laws of Arizona and was insured thereunder by the defendant carrier.

2. The applicant testified that she was the defendant employer's creative director from 1987 until December 13, 1991 and that, as such, she was responsible for putting out 40-45 catalogs (totalling about 2,800 pages) per year. Each catalog entailed deadlines and the applicant accepted that deadlines were in the nature of the business. She testified that she reported to Gary Giesler, that they had "mutual respect" for each other but that they argued often, especially in 1990 and 1991, regarding personnel cutbacks. She had been diagnosed since 1986 with chronic fatigue syndrome which required her to have frequent bed rest so that she routinely took Wednesdays off work although she made up the time on nights and weekends, managing to maintain a 50 hour work week. She testified that her illness and Wednesdays off were common knowledge in the company. Nevertheless in 1990 and 1991, she was frequently contacted at home on Wednesdays, either directly by Mr. Giesler or by her own subordinate managers at Mr. Giesler's urging, regarding

matters that "could have waited" until her return to work on Thursday. She was also involved in a situation regarding an employee, Susan Birmingham, who the applicant hired into her department in 1990 and who ultimately ended up suing the applicant, among others, for religious discrimination. She testified that beginning in fall 1990 and thereafter until she took medical leave effective October 31, 1991, Mr. Giesler increasingly questioned her management ability and met privately with her subordinate managers. She testified that the stresses of unfilled open positions in her department, her overworked staff, her increased work load, her worsening relationship with Mr. Giesler, the Birmingham lawsuit, interruptions of her February 1991 vacation by Mr. Giesler regarding hiring her assistant (who was not hired until June 1991), the interruptions at home on her off Wednesdays, her incomplete 1991 performance evaluation, criticism from her supervisor without any direction as how to respond to or correct the problems, not being given credit for her accomplishments in the company, the meetings with her managers outside of her presence, and not being given any special consideration for her illness all resulted in a worsening of her chronic fatigue syndrome condition. She testified that she was told she was difficult and unapproachable, and that there was a morale problem in her department. She acknowledged being "demanding" but testified that she tried to address these problems in meetings with her staff. She testified that when her respiratory problem worsened in summer 1991, she was advised by her then treating physician to take three months off work, she discussed that with Steve Lightman and Mr. Giesler, and was given a letter on October 31,

1991 that she understood placed her on medical leave. She worked part time as a consultant from November 1, 1991 to December 13, 1991 and did not work for the defendant employer thereafter. She testified that after her relationship with Mr. Giesler soured in 1991, that he was tough with her but not fair, that he took away her authority, that he would undercut her, that he did not back her up, that he abused her Wednesdays off, and that he was caustic and abrupt. The applicant acknowledged other stressors in her life including two divorces, raising three children, and other medical problems. She testified that the chronic fatigue syndrome has not improved since she has been off work.

3. Josie Davis testified that she was hired as an assistant by the applicant, that she was aware of applicant's chronic illness, that she knew applicant did not work on Wednesdays but made up the time on nights and Saturdays, and that she had no personal knowledge of Mr. Giesler's treatment of the applicant.

4. Gary Dudash testified that he was hired by the applicant and promoted within her department, that he was aware of applicant's chronic illness and Wednesdays off, and that he observed the applicant work at night and on weekends. He testified that on one occasion he delivered papers to the applicant's home on a Wednesday at Mr. Giesler's request. He testified that he did not know if the applicant had been called first, that he did not know the contents of the envelope he delivered, that he did not ever learn why it was urgent that the envelope be delivered to the applicant at home, and that he woke the applicant when he delivered the envelope. He testified

that the delivery occurred sometime in 1991 at about 1:00 to 2:00 p.m.

5. Dennis Roberts testified that he was hired by the applicant, that he was aware of her illness, he knew she took Wednesdays off, and that he saw her make up that time on Saturdays. He testified with regard to applicant's Wednesdays off that she was contacted at home by telephone when necessary but that those calls were kept to a minimum, and that the applicant sometimes had her in-basket sent to her home on Wednesdays. He testified that Mr. Giesler was very involved in how the applicant handled her department and that Mr. Giesler dealt directly with the applicant except on Wednesdays when he communicated with her managers in her absence. He testified that Mr. Giesler at one point met with applicant's managers regarding complaints about applicant's management style, then confronted the applicant directly telling her that the majority of her department thought she was an ogre and that she should do something about that. He testified that the applicant then met with her staff in an effort to clarify, dispel and/or change the situation. He testified that at least on two occasions he had to walk the applicant to the parking lot after she had met with Mr. Giesler and was barely able to walk back to her own office.

6. Jim Brand, the defendant employer's human resources director at all times relevant herein, testified that he was aware of applicant's chronic illness, her Wednesdays off, and her working nights and weekends to make up that off day. He testified that the company began downsizing in 1990 and that the applicant was one of several directors who had trouble with downsizing. He

testified that the applicant was one director who regularly challenged Mr. Giesler on downsizing. He testified that the October 31, 1991 letter setting forth the particulars of her medical leave was actually intended to be her termination letter although the applicant did not understand that to be the case. He testified that Mr. Giesler had a "short fuse", that he would holler, shout and scream at one director in front of the others, and that he gave his directors responsibility but not authority. He testified that he was aware of morale problems in applicant's department from complaints directed to him by several of her associates. He considered some of the complaints about the applicant to be legitimate, others not. Those complaints were that the applicant was controlling, demanding and critical and he occasionally discussed those complaints with the applicant. He testified that the employer's business is demanding and that he personally worked on evenings and weekends. He characterized Mr. Giesler as a micromanager who essentially managed all the departments. He testified that while it was unusual for Mr. Giesler to meet with all the applicant's managers as he did on one occasion, it was not unusual for Mr. Giesler to speak directly to individual managers in all the departments. He testified that applicant's predecessor as creative director had similar problems as the applicant had with Mr. Giesler.

7. Gary Giesler, the defendant employer's executive vice president, testified that Arizona Mail Order now employs over 1,000 people with an eighteen million dollar annual payroll, carries twenty-five million dollars in inventory, and ships about five million packages annually. He testified that he became aware of applicant's

chronic fatigue syndrome in the mid 1980's at which time it was decided she would take Wednesdays off and reduce her travel. He testified that he learned of applicant's problems with her managers when he met with them in 1990, that turnover was a problem in her department, that he met with applicant regarding her department's problem, that he discussed solutions with her, that there was some improvement but then the applicant drifted back, and that ultimately the problems were not solved. He testified that the applicant became sicker in 1991 and they discussed and implemented a medical leave of absence. With regard to applicant's off Wednesdays, he testified that he never called the applicant in on a Wednesday for a special directors meeting (director's meetings were generally held on Tuesday) and that he recalled only one occasion where he called the applicant on a Wednesday and sent Gary Dudash out to her home. He testified that he often sent the applicant home when she did not look well, that he tried to make the job easier for her, he encouraged her to hire a second-in-command, and there was no increased stress on the applicant in 1990 to 1991. He denied calling the applicant at home on Wednesdays and stated that, to the contrary, the applicant encouraged her people to call her on Wednesdays. He testified that he does not tolerate directors who are unprepared or who interrupt him, and that the applicant did both. He testified that he accommodated her illness until it worsened in 1991 and affected her functioning. He attributed her worsening to her inability to handle the pressure that was intrinsic in the job. He testified that he helped the applicant on the job and in her personal life. He testified that there was a similar situation and

response in the department in 1987 with applicant's predecessor. He denied that he intended to terminate the applicant in October 1991; rather, he was trying to protect her and assist her in obtaining disability income. He testified that he was concerned the catalogs might not go out because of the high turnover rate in applicant's department. He denied giving his directors responsibility without the necessary authority but did acknowledge that that may be the case when the director does not implement his plan causing him to "jump in", as he did with the applicant and with Jim Brand.

8. Steven Lightman, the defendant employer's executive director testified that he became aware of the applicant's illness in 1986 and that she was accomodated with the Wednesdays off as well as other scheduling flexibility when she needed to see doctors or did not feel well. He observed the applicant on occasion when she interrupted Mr. Giesler (which would cause Mr. Giesler to become irritated) and when she was unprepared at directors meetings (which also upset Mr. Giesler). He testified that the applicant took criticism personally and that she acknowledged that in conversations with the witness. He testified that Mr. Giesler did not treat the applicant differently than the other directors, reacted equally to any director who was unprepared, and did not single out the applicant or pick on her. He testified that there was a problem in the applicant's department and that he helped deal with the problem by participating in meetings with the applicant's department heads and then with the applicant. He testified as of October, 1991, it was not their intent to terminate the applicant's employment but, rather, they hoped she would recover and return to work.

He testified that the directorships with the defendant employer are stressful positions and that each departmental director has to deal with deadlines and coordination with other departments.

9. Mark Jones, who worked under the applicant as a production manager, testified that the applicant promoted him, that he got along well with her, and that he has no animosity toward her. To his observation, the applicant delegated very little and could be vindictive and intimidating. He was not aware of any other employees besides the applicant who had any problem with Mr. Giesler.

10. Linda Keraky, who was hired by the applicant to work in her department, testified regarding a meeting she had in mid-1991 with the applicant and several department managers wherein she was berated and threatened with demotion (although nothing was personally said to her by the applicant during the meeting). She testified that she participated in Mr. Giesler's manager meetings, that some employees thereafter feared retaliation and that there were some repercussions by the applicant through her top managers. She testified that there was high turnover in the applicant's department, that the applicant sabotaged and fired her people, that the applicant was not loyal to her employees, and that the applicant delegated very little.

11. David Eldridge, who worked under the applicant in her department, testified that the applicant had to be in charge of everything and did not seek input from her employees. He was afraid of and intimidated by her. He testified that she was always in the process of firing

someone. He testified that she convened meetings on Friday evenings to keep her employees at work after quitting time.

12. Cheryl Davidson, who worked under the applicant in her department, testified that the applicant was unapproachable and defensive. The applicant wanted to know and hear about every contact any other employees had with Mr. Giesler.

13. Malinda Briggs, who was hired by and worked under the applicant, testified that she was aware of the applicant's illness, that she was aware that applicant took Wednesdays off, and that the applicant asked people in the department to bring work to her home on Wednesday. She attended the managers meeting with Mr. Giesler and also a follow up meeting with the applicant. She testified that she had complained about the applicant to Mr. Brand a few years earlier and, thereafter, "had a very rough time in the department" vis-a-vis the treatment of herself and her staff by the applicant. She testified that the applicant could be a difficult person to approach, that the turnover rate in her department was high, and that on occasion the applicant approached her for information to use as grounds to fire other people. She testified that the applicant did appear to be physically ill and that she always had mood swings. To her observation, Mr. Giesler was just trying to get to the bottom of the situation and he appeared to the witness to be "solicitous" to the applicant. She characterized the applicant as having good technical knowledge of her job but weak people/management skills. She testified that in her estimation the work load in their department was about the same in the applicant's last two to three years.

14. General practitioner Brian L. Cabin, M.D., the applicant's current treating physician, testified regarding his care of the applicant since April 29, 1992. He has diagnosed chronic fatigue sydrome [sic] and has treated the applicant, providing some relief although she remains disabled. He testified that chronic fatigue syndrome is classified as a psychosomatic illness and that the applicant's condition has some psychological ramifications. He testified that the stress of the work place, including being "badgered" and "disturbed" once per month on her Wednesdays off, adversely affected the applicant. He testified that she had a relapse in 1991 requiring increased treatment and a longer time for recovery, which has not yet occurred in the two-and-a-half-plus years applicant has been off work.

15. Licensed psychologist and clinical neuropsychologist Erich Hansen, Ph.D., testified regarding his evaluation of the applicant on March 3, 1992 and January 10, 1994. He has diagnosed a syndrome of psychological factors affecting physical condition, which is related to applicant's chronic fatigue syndrome. The applicant is anxious and depressed/dysthymic which tends to operate in a mutually exacerbating cycle with her physical condition. He testified that applicant's on-the-job stress was a substantial contributing cause of the exacerbation of her psychological condition which in turn exacerbates her chronic fatigue syndrome. He understood her substantial on-the-job stress included working 70 hours per week, difficulties with the adversarial and accusatory managerial style of her direct supervisor, Wednesday interruptions at home, problems with the assistant the

applicant hired in June 1991, the manner of her termination, and the pressures of her job as creative director. He testified that sources of applicant's anxiety included chronic fatigue syndrome, money worries, this worker's compensation claim, problems with her children, and the death of her step-father. He testified that the applicant has not improved because she is not psychologically removed from the work place. He testified that the industrial stressors are more significant causes of her psychological problems that the non-industrial stressors.

16. Board certified rheumatologist Steven Strong, M.D., testified regarding his evaluation of the applicant on November 9, 1993. He diagnosed the applicant as having chronic fatigue syndrome and fibrositis, the causes of which are unknown. He testified that persons who have chronic fatigue syndrome and are placed in stressful situations are eventually nonfunctional because such people are less tolerant of stress. When asked to assume that the applicant was working 60 plus hours per week, that she was interrupted on her off Wednesdays and that she was stressed by the process of hiring her assistant, he concluded that such stress contributed to and made her chronic fatigue syndrome symptoms worse. He testified that applicant's chronic fatigue syndrome symptoms should improve if the stressors are removed but he questioned whether applicant was removed from the stressors given the litigation process.

17. Licensed psychologist Anne Miller, Ph.D., testified regarding her evaluation of the applicant on November 15 and November 16, 1993. She considered but did not diagnose psychological factors affecting physical condition. She did diagnose adjustment disorder and

depressed mood related to the circumstances of applicant's physical problems and this litigation. She testified that applicant's non-work stressors post-employment could be causing her adjustment disorder to continue. She concluded that even if applicant's work stress was unusual, unexpected or extraordinary, it nevertheless was only a slight, and not a substantial, contributing cause of her psychological condition. She testified that applicant's depression stems from her limitations related to her chronic fatigue syndrome and fibromyalgia. Assuming repeated Wednesday interruptions at home, she still does not feel those were a significant contributing cause of applicant's problems.

18. The applicant has the burden of proof by preponderance of the evidence to establish all of the material elements of her claim. *Russell v. Industrial Commission*, 104 Ariz. 548, 456 P.2d 918 (1969). The term "preponderance" merely means that the testimony which points to one conclusion appears to the trier of fact to be more credible than the testimony which points to the opposite one. *Brooks v. Industrial Commission*, 24 Ariz. App. 395, 539 P.2d 199 (1975). An Administrative Law Judge is the sole judge of the witness's credibility. Although an Administrative Law Judge may not reject the testimony of interested parties simply because it is self-interested, she may reject it if it is self-contradictory, inconsistent with other evidence or directly impeached. *Holding v. Industrial Com'n*, 139 Ariz. 548 (App.), 679 P.2d 571 (1984).

In determining questions of credibility, consideration may be given to:

> "The tone of voice in which a witness's statement is made, the hesitation or readiness with which her answers are given, the look of the witness, her carriage, her evidences of surprise, her gestures, her zeal, her bearing, her expression, her yawns, the use of her eyes, her furtive or meaning glances, or her shrugs, the pitch of her voice, her self-possession or embarrassment, her air of candor or of seeming levity." J. Frank, *Law and the Modern Mind*, 109 (1936), quoted in *Adams v. Industrial Com'n of Arizona*, 147 Ariz. 418 (App.), 710 P.2d 1073 (1985).

19 A.R.S. § 23-1043.01 (B) states:

> "A mental injury, illness or condition shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition."

Whether stress is "unusual, unexpected or extraordinary" is a legal conclusion not a medical conclusion. *Barnes v. Industrial Commission of Arizona*, 156 Ariz. 179, 182, 750 P.2d 1382 (App. 1988). The test for determining the measure of emotional stress is an objective, not a subjective, one. *Pima Community College v. Industrial Commission of Arizona*, 137 Ariz. 137, 140, 669 P.2d 115 (App. 1983). A claim for a mental injury resulting from emotional stress on the job is governed by *A.R.S.* § 23-1043.01 (B), supra. A claim for a physical injury resulting from emotional stress on the job is governed by the general

compensation statute, A.R.S. § 23-1021 and does not require a finding that the stress was unusual, unexpected or extraordinary. *Murphy v. Industrial Commission of Arizona*, 160 Ariz. 482, 484, 774 P.2d 221 (1989).

20. Where the result of an accident is not one clearly apparent to a lay person, the applicant's physical condition and its causal relationship to the industrial episode must necessarily be determined by expert medical testimony. *McNeely v. Industrial Commission*, 108 Ariz. 453, 501 P.2d 555 (1972). The medical condition must be established to a reasonable degree of medical probability. *Payne v. Industrial Commission*, 136 Ariz. 105, 664 P.2d 649 (1983). If the experts' testimony is in conflict, it is the responsibility of the Administrative Law Judge to resolve it. *Ortega v. Industrial Commission*, 121 Ariz. 554 (App.), 592 P.2d 388 (1979). Many factors enter into a resolution of conflicting testimony, including whether or not the testimony is speculative, consideration of the diagnostic methods used, the qualifications and backgrounds of the expert witnesses, their experience in diagnosing the type of ailment involved and their conscious or unconscious bias or interest in the result to be reached. *Ison v. Western Vegetable Distributors*, 48 Ariz. 104, 59 P.2d 649 (1936); *Cash v. Industrial Commission*, 27 Ariz. App. 526, 556 P.2d 827 (1976). Demeanor may be material in resolving conflicts in expert testimony. *Ohlmaier v. Industrial Com'n of Arizona*, 161 Ariz. 113, 776 P.2d 791 (1989).

21. The defendants have also raised the affirmative defense of applicant's alleged failure to file this claim within the one year statute of limitations. *See A.R.S.* § 23-1061 (A). The undersigned finds that the applicant has alleged gradual physical and mental injuries that

occurred up to and including her last day of employment on December 13, 1991. The claim filed by applicant on December 11, 1992 was therefore timely filed.

22. The applicant alleges that the level of stress on the job was unusual, unexpected or extraordinary and that she has therefore sustained compensable mental and physical injuries. It is clear to the undersigned that the applicant's work place and work situation were undoubtedly stressful. She was employed in a high profile, intense position. Stress was inherent and present in her job, in her department and throughout the defendant employer. In addition to the nature of the work the situation was exacerbated by various personality conflicts involving the applicant and her superiors and subordinates. There is some conflict in the evidence as to specifics, particularly regarding the level of interruptions of the applicant on her Wednesdays off and the facts surrounding her ultimate termination. The undersigned finds that the applicant worked about 50 hours per week including some nights and weekends, that she was not unreasonably or frequently disturbed at her home on Wednesdays, and that some of the Wednesday interruptions were at the request and instigation of the applicant. Clearly, the applicant was not always an easy person to work with or for and Mr. Giesler was not an easy person to work with or for. However, applying the law to these facts, the undersigned must conclude that, yes this was a stressful environment, but, given the nature of the applicant's job and the nature of the applicant, she was not exposed to unusual, unexpected or extraordinary stress as required by and defined in A.R.S. § 23-1043.01 (B) and the case law that interprets that statute.

23. With regard to the psychological issue and diagnosis (psychological factors affecting physical condition per Dr. Hansen and adjustment disorder with depressed mood per Dr. Miller), the conflict in the psychological evidence is resolved by adopting the testimony and opinions of Dr. Miller as being most probably correct and well founded. The applicant's work was not a substantial contributing cause of her psychological condition and, in any event, she was not subject to unusual, unexpected or extraordinary stress with the result that the applicant did not sustain a compensable mental injury related to her work.

24. With regard to the physical diagnosis, chronic fatigue syndrome, both testifying physicians agreed that applicant's chronic fatigue syndrome which preexisted the date of injury, was obviously not caused by the applicant's work. However, they both agreed that applicant's on-the-job stress aggravated her chronic fatigue syndrome. Where stress causes or, as here, aggravates and makes worse a preexisting physical condition, it is not required that the stress be unusual, unexpected or extraordinary. *See Murphy v. Industrial Commission of Arizona,* supra. Even though the applicant's on-the-job stress was not unusual, unexpected or extraordinary, nevertheless her on-the-job stress aggravated and made worse her chronic fatigue syndrome and that constitutes a compensable industrial injury.

25. The applicant sustained a compensable aggravation of her chronic fatigue syndrome. For that aggravation only, she is entitled to temporary total and/or temporary partial disability compensation as well as medical, surgical and/or hospital benefits to the extent

provided by law, from December 13, 1991 until her condition related to this accident is medically stationary.

AWARD

IT IS HEREBY ORDERED THAT THE APPLICANT BE AWARDED:

1. Temporary total and/or temporary partial disability compensation, to the extent provided by law, from December 13, 1991 until such time as her condition related to this accident is medically stationary;

2. Medical, surgical and/or hospital benefits, to the extent provided by law, from December 13, 1991 until such time as her condition related to this accident is medically stationary.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within **THIRTY (30) DAYS** after the mailing of this Award as provided by *Arizona Revised Statutes*, Sec. 23-942 D and 23-943 A and B. Unless such written request is made within the time provided, this Award is final.

By /s/ Gary M. Israel
GARY M. ISRAEL
ADMINISTRATIVE LAW JUDGE

GMI:crk

DATED AND MAILED IN TUCSON, ARIZONA THIS 11TH DAY OF OCTOBER 1994.

APPENDIX E

NOTICE OF CLAIM STATUS

92352-252049

Carrier's Name and Address

LIBERTY MUTUAL
P.O. BOX 52037
PHOENIX, ARIZONA
85072-2037

Soc. Sec. No. 497-46-0745
(ALSO I.C.A. Claim No.)

Carrier Claim No. C609-85340

Employer Arizona Mail
3740 E 34 St
Tucson, AZ 85713

Date Injured 12-13-91

Claimant's Name and Address

Jan Casey
c/o Rabinovitz & Assoc.
P.O. Box 41600
Tucson, AZ 85717

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1. _ Claim is accepted for benefits by the above-named insurance carrier.

2. _ Claim is denied for benefits by the above-named insurance carrier.

3. _ No compensation paid because no time was lost from work in excess of 7 days attributable to this injury.

4. X Enclosed check for $32174.97 covers time lost, commencing 12-13-91 through 11-10-93 (7 days have been deducted if less than a 4 calendar days lost). Payment has been made based on 66⅔% of the monthly wage of $2100.00 based on the following:

✓ A. Statutory Minimum or estimated monthly wage pending determination of Average Monthly Wage within 30 days.

B. Average monthly wage at time of injury, (see attached calculation) subject to final determination by the Industrial Commission of Arizona within 30 days.

5. _ Temporary compensation changed to 66⅔% of the difference between average monthly wage before injury and the wage claimant is able to earn after date of release for work, effective _____

6. X Temporary compensation and active medical treatment terminated on 11-11-93 because claimant was discharged.

7. X Injury resulted in no permanent disability.

8. _ Injury resulted in permanent disability. (Amount of permanent benefits, if any, and supportive medical maintenance benefits, if any, will be authorized by subsequent Notice.)

9. _ Petition to Reopen accepted for benefits by the above-named insurance carrier.

10. _ Petition to Reopen denied for benefits by the above-named insurance carrier.

11. X Other. per attach medical

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9/1
6/12

MAILED ON 3-15-95 BY: /s/ Daniell Lutes
(Authorized Representative)
Tel. #997-4700

Copy to: Industrial Commission of Arizona

Liberty Mutual

* * *

Phoenix Office: Industrial Commission of Arizona
800 W. Washington
Phoenix, Arizona 85007-2922

P.O. Box 19070
Phoenix, Arizona 83005

Tucson Office: Industrial Commission of Arizona
2675 E. Broadway
Suite 201
Tucson, Arizona 85716

(THIS FORM APPROVED BY THE INDUSTRIAL COMMISSION OF ARIZONA FOR CARRIER USE)

APPENDIX F

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

JAN R. CASEY, Applicant, vs. ARIZONA MAIL ORDER, Defendant Employer, LIBERTY MUTUAL INSURANCE, Defendant Insurance Carrier.	ICA CLAIM NO. 92352-252049 SOC. SECURITY NO. 497-46-0745 CARRIER CLAIM NO. C609-085340 DATE OF INJURY: 12/13/91 **DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS**

On December 13, 1991, the applicant sustained an industrial injury. On December 15, 1994, the applicant's claim, which had been denied, was deemed compensable. On March 15, 1995, the defendant insurance carrier issued a NOTICE OF CLAIM STATUS closing the applicant's claim without a permanent disability effective November 11, 1993. Thereafter, on April 27, 1995, counsel for the applicant filed a REQUEST FOR HEARING PURSUANT TO A.R.S. §23-1061 (J) protesting non-payment of compensation by the defendant carrier and the closure of her claim and pursuant thereto, formal hearings were held in Tucson, Arizona on September 20, 1995, November 11, 1995, and April 10, 1996.

The applicant is represented by attorney, Bernard I. Rabinovitz. The defendants are represented by attorney, Donald L. Cross.

The undersigned, having fully considered the file, testimony and all relevant matters, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On December 13, 1991, the applicant sustained injury while employed as a clerk by the above-named defendant employer, who at all times relevant to this Decision, was insured under the provisions of the Arizona Workers' Compensation Laws against liability for the payment of medical, surgical, hospital and/or compensation benefits by the defendant insurance carrier herein. The applicant's claim has been accepted and closed without a permanent disability effective November 11, 1993.

2. The applicant testified that her symptoms today are the same as the ones she had in November of 1993, and that those symptoms consist of an overall sense of fatigue, muscle pain in the shoulders and upper back, and swelling of the glands in her neck, and under her arms when she exerts herself, as well as rashes on her face. She related that she does not feel well enough to go back to work and that she has a hard time in the mornings because of the exhaustion and the pain. She stated that her best time of the day is between one o'clock to four o'clock in the afternoon, and that after a three or four hour span she feels overly fatigued. She stated that her functional capacity has not risen to the same level she

had prior to her injury and that she also experiences a sleep disorder.

3. The applicant has the burden to prove her claim by a preponderance of the evidence. *Brooks v. Industrial Commission,* 24 Ariz. App. 395, 539 P.2d 199 (1975). *In Re Estate of Bedwell,* 104 Ariz. 443, 454 P.2d 985 (1969); *Malinski v. Industrial Commission,* 103 Ariz. 213, 439 P.2d 485 (1968).

4. In this case the applicant has the burden of establishing that her condition is causally related to the subject industrial episode and that she is not medically stationary or, alternatively, if she is medically stationary, that she has sustained a greater disability than previously determined. *Spears v. Industrial Commission,* 20 Ariz. (App.), 496, 513 P.2d 695 (1973); *Timmons v. Industrial Commission,* 83 Ariz. 73, 316 P.2d 935 (1957).

5. The law in Arizona is well established that where a physical disorder is not readily apparent to laymen, the existence of a physical disorder, its etiology, the need for further treatment or the existence of a permanent impairment are all matters which can be established only by expert medical evidence. *Yates v. Industrial Commission,* 116 Ariz. 125, 568 P.2d 432 (1977); *Spears v. Industrial Commission,* 20 Ariz. App. 496, 513 P.2d 694 (1969).

6. The medical evidence in this case consists of various pieces of documentary evidence and the testimony of Dr. Brian Carpin [sic], and Dr. J. Steven Strong, all of which have been considered herein.

7. Dr. Brian Capin [sic], a chronic fatigue specialist, testified that he has treated patients with chronic fatigue

syndrome for upwards of eight or nine years, and that he has treated the applicant, who he has diagnosed as having a chronic fatigue syndrome. He related that the applicant's condition is related to her industrial injury of December 13, 1991, and that the applicant's condition is not stationary and that the applicant is unable to work. He related that the applicant experiences constant pain, and that she has not improved. He stated that he was treating the applicant for the condition diagnosed by Dr. Strong, in November of 1993, and that that condition was fibromyositis. He related that he first started treating the applicant on April 29, 1992, and that the applicant had a long standing history of mild hypothyroidism, manic depression, and headaches. He related that the applicant's sleep disturbance has exacerbated pain and increased fatigue. He related that the applicant's chronic fatigue syndrome is also exacerbated by stress in the work place. He related that the applicant continues to suffer from the effects of the aggravation of the preexisting condition to a reasonable medical probability.

8. Dr. J. Steven Strong, internal medicine and rheumatology specialist, testified that he examined the applicant in 1993, and diagnosed the applicant's condition as a chronic fatigue syndrome and that he saw the applicant on November 28, 1995, and on December 8, 1995. He related that he had formulated four impressions regarding the applicant: febromyocitis with the symptoms of chronic fatigue syndrome, prior history of Epstein-Barr viral infection with possible mononucleosis during her teenage years; early osteoarthritis developing in the knees, left greater than the right; she had a hearing loss in the left ear, post closure of the external canal; plus she

had mild obstructive sleep apnea. He stated that the applicant's osteoarthritis, hearing loss and obstructive sleep apnea, are not related to the chronic fatigue syndrome. He further stated that he did not know whether or not the chronic fatigue syndrome is specifically related to the Epstein-Barr virus. He further stated that he was of the opinion that work related stress does not cause chronic fatigue syndrome, but that work stress may aggravate chronic fatigue syndrome. He stated that, inasmuch as the applicant was no longer working and had not worked for four years, he was of the opinion that the applicant's condition relative to the chronic fatigue syndrome is stationary without permanent impairment related to the incident of December 13, 1991.

9. If the experts' testimony is in conflict, it is the responsibility of the Administrative Law Judge to resolve it. *Ortega v. Industrial Commission*, 121 Ariz. 554 (App.), 592 P.2d 388 (1979).

10. Upon review of the medical evidence in this case, the testimony of Dr. Strong is found to be most probably correct and well-founded.

11. The applicant has failed by a preponderance of the medical evidence to establish that her condition related to the December 13, 1991 industrial injury requires further active medical treatment and/or that her condition has become stationary with a permanent impairment.

AWARD

THE APPLICANT IS HEREBY AWARDED:

1. Medical, surgical and hospital benefits, as provided for by law, from December 13, 1991, through November 28, 1995; and

2. Temporary total and/or temporary partial disability benefits, as provided for by law, from December 13, 1991, through November 28, 1995.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within **THIRTY (30) DAYS** after the mailing of this Award as provided for by *Arizona Revised Statutes*, §§23-942 D and 23-943 A and B. Unless such written request is made within the time provided, this Award is final.

By /s/ Bill H. Enriquez
BILL H. ENRIQUEZ
Administrative Law Judge

BHE:mje

DATED AND MAILED IN TUCSON, ARIZONA
THIS 20TH DAY OF MAY 1996.

APPENDIX G

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAN R. CASEY, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, ARIZONA MAIL ORDER, Respondent Employer, LIBERTY MUTUAL, Respondent Insurance Carrier.	ORDER (MANDATE) 2 CA-IC 96-0032 Department A (Filed Jul. 31, 1997)

To: The Industrial Commission of Arizona, in relation to ICA Claim No. 92352-252049; 497-46-0745

The above cause was presented in your court and was brought before Division Two of the Court of Appeals of the State of Arizona in the manner prescribed by law. This court rendered its MEMORANDUM DECISION and caused the same to be filed on January 21, 1997.

No Motion for Reconsideration was filed and the time for filing such has expired.

A Petition for Review was filed and DENIED by order of the Arizona Supreme Court.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the MEMORANDUM DECISION of this Court, a copy being attached hereto.

WITNESS, THE HONORABLE M. Jan Florez, Presiding Judge, Department A Court of Appeals, Division Two, of the State of Arizona.

Dated: July 31, 1997

[SEAL]

/s/ Joyce A. Goldsmith
Joyce A. Goldsmith
Clerk of the Court

Copies to:

Attention: Bernard I. Rabinovitz
RABINOVITZ & ASSOCIATES, P.C.
P.O. BOX 41600
Tucson, AZ 85717

Attention: Donald L. Cross
Lisa M. Ashbrook
CROSS & LIEBERMAN
Suite 1725
2800 North Central Ave.
Phoenix, AZ 85004-1048

James Crane
STATE COMPENSATION FUND
General Counsel
3031 N. 2nd Street
Phoenix, AZ 85012
Hon. Bill Enriquez
Administrative Law Judge
Industrial Commission of AZ
2675 East Broadway
Tucson, Az 85716

Hon. Eileen S. Willett
Chief Administrative Law Judge
Industrial Commission of AZ
P.O. Box 19070
Phoenix, AZ 85005-9070

Anita Valainis
INDUSTRIAL COMMISSION OF ARIZONA
Chief Counsel
800 W. Washington St., Ste 400
Phoenix, AZ 85007
(ORIGINAL MANDATE)

INDUSTRIAL COMMISSION RECORD RETURNED THIS DATE:

RECORD – 2 Vols.

RECEIVED: _____

Clerk, Industrial Commission

By: _____
Deputy Clerk

APPENDIX H

PETITIONER'S OPENING BRIEF, PAGES 26, 27

* * *

physical condition was not yet stationary. The Court of Appeals acknowledged that there had been an inconsistency in the record at the time of the earlier decision as to whether or not the applicant's condition was stationary. Of specific importance here, beside reiterating the finality of an unprotested award under *Talley*, supra, the following wording may well be dispositive herein:

> The 24 April 1973 Finding No. 2 that the petitioner's physical condition was stationary on 20 September 1972 is not consistent with the 28 October 1970 award Finding No. 3 that his physical condition was then not yet stationary. As we read Finding No. 2 in the 24 April 1973 award this is not a finding that his condition became stationary on 20 September 1972 but a finding that on that date it was stationary.
>
> There is no medical evidence in the file subsequent to the 28 October 1970 award. In view of our holding in this matter, we express no opinion as to whether the totality of the circumstances might justify an award specifying a stationary physical condition. In view of the absence of medical evidence the 24 April 1973 award must be set aside on this timely judicial review.

Huffman, supra, at 406.

Comparing the foregoing case with the instant case clearly shows that the findings by Judge Israel that the Petitioner was entitled to continuing medical treatment

and temporary disability compensation were stronger than *Huffman*, supra, and tantamount to finding that the applicant's condition was not stationary on October 11, 1994. Since that finding was not contested there is no way that the carrier could appropriately breath life into an earlier independent medical examination which ironically made no reference to the condition being stationary with no disability.

Therefore, it is respectfully asserted that issue preclusion and res judicata should have prevented the carrier from attempting to ignore the finding of Judge Israel based upon a medical report that pre-existed his decision. Judge Enriquez's allowing relitigation of the precluded matters constituted reversible error and denied Petitioner due process of law as guaranteed by the United States and Arizona Constitutions. See *Landgraff v. Wagner*, 26 Ariz. App. 49, 54-55, 546 P.2d 26 (1976).

Here, Judge Israel entered a finding of continuing causally-related disability by adopting the testimony of Dr. Cabin over that of Dr. Strong. Here, also, there was no medical evaluation after the Administrative Law Judge's Award upon which to base a change of disability status, nor did the medical report relied on to establish the termination make reference to "stationary," "permanent," or "disability".

It was a total vitiation of the hearing process to allow the carrier herein to permit the award finding an entitlement to temporary disability benefits to become final, and subsequently pay benefits from the date of injury only to the date of a pre-hearing medical examination

that made no reference to "disability" or "stationary condition." The carrier should not be permitted to allow an award to become final and then attack it after partially paying under said award, and then terminating benefits without documentation of a change in medical status.

In *Bayless vs. Industrial Commission*, 179 Ariz. 434, 439, 880 P.2d 654 (App. 1993) the Arizona Court of Appeals held that:

> The applicability of preclusion, however, may involve disputed questions of fact: for example, whether a particular issue

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APPENDIX I

PETITIONER'S REPLY BRIEF PAGES 9, 10

* * *

CONCLUSION

Petitioner has now spent three years fighting both her debilitating ailments and the Respondents who have engaged in a pattern of finding new ways to deprive Petitioner of her constitutionally entitled benefits. Judge Enriquez, by allowing Respondents to revisit the res judicata Award of Judge Israel, extended the delay and encouraged further litigation. Further, the ALJ, by failing to address most of the critical issues that were properly before him, has violated Arizona law and Petitioner's due process rights under both the U.S. and Arizona Constitutions. Finally, Petitioner feels constrained to point out the cavalier attitude of the Answering Brief.

By alleging non-issues because the subsequent ALJ award extended benefits, Respondents overlooked the fact that Petitioner was forced to do without benefits for at least two years and was required to institute costly and time-consuming litigation. If Respondents arrive at their non-issue position because they finally paid the extended benefits after the Opening Brief was filed, they are using facts not in the record in order to support their position. They also end up manipulating this Special Action to suit their whim. Any system that determines the payment of benefits at the whim of the carrier must not be condoned by this Honorable Court. Not only would this procedure deny Petitioner due process of law as guaranteed by the state and federal constitutions, it also would violate the spirit and intent of the Workers' Compensation Act. Most

alarming is Respondent's attempt to camouflage its failure to comply with the Statutes and Rules, by denying Petitioner's benefits when she was entitled to receive them, by, at the last minute, paying benefits that should have been paid three years earlier.

Respondents' failures should not be swept under the rug without penalty because the ALJ finally ordered payment without explanation. Sanctions should have been imposed by the ALJ and his failure to do so, or even visit the area, leaves the way open for this Honorable Court to impose the sanctions or to set aside the Decisions below because these issues were not reached by the ALJ.

WHEREFORE, for all the foregoing reasons stated, Petitioner contends that Respondents have failed to impair the logic and authorities used in support of her arguments as set forth in her Opening Brief. It is therefore respectfully requested that this Honorable Court set aside the decisions below and grant the relief prayed for in Petitioner's Opening Brief.

RESPECTFULLY SUBMITTED this 27th day of November, 1995.

By: /s/ Bernard I. Rabinovitz
Bernard I. Rabinovitz
Attorney for Petitioner

APPENDIX J

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAN R. CASEY, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, ARIZONA MAIL ORDER, Respondent Employer, LIBERTY MUTUAL, Respondent Insurance Carrier.	No. 2 CA-IC:96-0032, Dept. A. ICA No.: 92352-252049; 497-46-0745 Carrier No.: C609-085340 PETITION FOR REVIEW (Filed 97, Feb. 20)

COMES NOW Petitioner, by and through her counsel undersigned, and hereby respectfully petitions the Supreme Court of Arizona, pursuant to *Arizona Rule of Appellate Procedure 23*, to review the Decision of the Arizona Court of Appeals in this matter entered on January 21, 1997 upon the grounds and for the reasons that the Memorandum Decision issued by the Court of Appeals is not reasonably supported by the law or the evidence as set forth more specifically below.

I. SYNOPSIS OF THE DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the Decision of the Administrative Law Judge of the Industrial Commission of Arizona which retroactively terminated the benefits of an accepted chronic fatigue syndrome industrial injury to a date prior to the date of the Administrative Law Judge's Findings and Award for Compensable Claim on October 11, 1994. Respondent Carrier, as indicated in the Court of Appeals' decision on March 15, 1995, issued a Notice of Claim Status closing the claim effective November 11, 1993. The Court of appeals indicated that Petitioner requested a hearing pursuant to A.R.S. §23-1061(J) alleging that the carrier had improperly closed the case retroactively and was guilty of bad faith and that following hearings in this matter, a "second award" was issued May 20, 1996, which extended benefits through November 28, 1995. Despite the favorable result, Casey requested administrative review of the award, which was summarily affirmed, and now requests Special Action review by this Court. We, in turn, affirm. (Quote marks ours)

The Court of Appeals found that Petitioner's contention that the carrier had acted in bad faith by closing her claim effective November, 1993 based on a medical examination which antedated the October, 1994 award to have been without merit. The Court of Appeals cited no authority for this conclusion or any other aspect of its decision. The Court of Appeals determined that the October, 1994 ALJ Award had decided only compensability and whether or when Petitioner's condition was stationary or permanent were not at issue and thus were not

decided. The Court of Appeals determined that Petitioner's further arguments about the carrier's termination of benefits effective November 11, 1993 were rendered moot by the second award which extended benefits through November 28, 1995.

The Court of Appeals' Decision concluded by indicating that the award of May 20, 1996, which adopted November 28, 1995 as a stationary date and indicated that the finding of no permanent disability was fully supported by the evidence apparently finding that the Industrial Commission appropriately resolved a conflict of medical testimony between the carriers' physician, Dr. J. Steven Strong and the attending physician, Dr. Brian Cabin. The Court of Appeals then selected, in support of its decision, the following testimony of Dr. Strong:

> Dr. Strong testified that "referable to the aggravation of her work, I think that condition is stationary." He further testified that, although she had "persistent changes" since the earlier award, "they don't seem to be getting any worse, they don't seem to be getting any better, they seem to be staying about the same." Asked whether she had any impairment of function due to stress at work, Dr. Strong responded: "Impairment of function, meaning does she have any long-term deformities, or inability to function mechanically with her body, or intellectually, the carry[ing] on her daily life requirements of decision making, check writing and managing her own personal requirements, I think she can do all right with that."

Award affirmed.

The Memorandum Decision of the Court of Appeals, filed January 21, 1997, is attached hereto and by this reference made a part hereof for all purposes as Appendix A.

B. ISSUES PRESENTED TO AND DECIDED BY THE COURT OF APPEALS were as follows:

1) Should A.R.S. §23-1061(J) relief have been granted when benefits were retroactively terminated on a date earlier than an administrative law judge decision which found Petitioner entitled to continuing benefits until stationary?

2) Were the awards reasonably supported by the law and the evidence wherein benefits were terminated retroactively far beyond the thirty days provided by *R20-5-118* of the *Rules of Procedure for Worker's Compensation Hearings before the Industrial Commission of Arizona* and did said award violate the doctrines of issue preclusion and res judicata?

3) Was the subsequent ALJ award reasonably supported by the law and the evidence whereby it affirmed the March 15, 1995 Notice of Claim Status based upon resolution of a so-called conflict in which Respondent's physician testified that while Petitioner sustained no permanent impairment as to her daily needs, that in the work place she would be permanently limited as a result of said injury?

4) Did terminating Applicant's benefits contrary to a final ALJ award of entitling her to continuing benefits,

based upon a medical report that antedated that decision, amount to bad faith and unfair claims processing?

C. ISSUE PRESENTED BUT NOT DECIDED BY THE COURT OF APPEALS

Should the award be set aside for failure to make specific findings as to retroactive termination of benefits, issue preclusion, and bad faith?

D. FACTS MATERIAL TO A CONSIDERATION OF ISSUES

On October 11, 1994, Administrative Law Judge Gary Israel, following a series of hearings on the issue of compensability, entered a Decision Upon Hearing and Findings and Award for Compensable Claim to the effect that Petitioner had sustained a compensable chronic fatigue/Epstein-Barr Fibromyalgia gradual injury by way of her employment stress causing an aggravation of a pre-existing condition on December 13, 1991. A copy of this Decision is attached hereto and by this reference made a part hereof for all purposes as Appendix B. Specifically, this Honorable Court should review Finding No. 16 of said award wherein Adminsitraive Law Judge Israel stated, in pertinent part, with regard to Respondent's witness, Dr. Strong, that,

> He testified that the applicant's chronic fatigue syndrome symptoms should improve if the stressors are removed, but he questioned whether applicant was removed from the stressors given the litigation process. . . .

Further, Finding No. 25 indicated that,

> The applicant sustained a compensable aggravation of her chronic fatigue syndrome. For that aggravation only, she is entitled to temporary total and/or temporary partial disability compensation as well as medical, surgical, and/or hospital benefits to the extent provided by law, from December 13, 1991 until her condition related to this accident is medically stationary . . .

This award became final without protest.

On March 15, 1995, Respondent Carrier herein issued a Notice of Claim Status, a copy of which is attached hereto and by this reference made a part hereof for all purposes as Appendix C, reflecting that it was paying Petitioner compensation from the date of injury only through November 11, 1993 when the claim was closed with no permanent disability and medical benefits terminated. Said notice referred to attached medical, the 1993 report of Dr. Strong, a copy of which is part of Appendix C.

On April 25, 1995, Petitioner filed a Request for Hearing protesting the March 15, 1995 Notice of Claim Status, and Addendum thereto, and requesting A.R.S. §23-1061(J) relief as well as for sanctions for bad faith, a copy which is attached hereto and by this reference made a part hereof for all purposes as Appendix D.

A copy of the Decision Upon Hearing and Findings and Award for temporary disability benefits issued by Administrative Law Judge Bill H. Enriquez on May 20, 1996, is attached hereto and by this reference made a part hereof as Appendix E.

E. REASONS FOR GRANTING THIS PETITION

The most compelling reason for granting this Petition for Review is that no published Arizona decision controls the points of law in question. Simply stated, the essential question is can a carrier which has failed to appeal a final administrative law judge decision finding a compensable claim with continuing entitlement to benefits until the condition may become stationary, under-cut that award by subsequently terminating benefits retroactive to the date of the administrative law judge decision? By thus far permitting the carrier to do so, the Industrial Commission and the Court of Appeals have, in effect, reversed, by implication, prior decisions of the Arizona Supreme Court which have established that res judicata applies to all of the parties to a worker's compensation proceeding. Since neither the Industrial Commission of Arizona nor the Arizona Court of Appeals has the jurisdiction to overturn decisions of the Arizona Supreme Court, the results will be chaotic! Since we are here dealing with social litigation to be liberally construed in favor of the worker, the decisions below not only do violence to that purpose, but to stare decisis of the prior decisions of this Honorable Court and the Court of Appeals. By refusing to apply the doctrines of res judicata or issue preclusion, as previously having been held applicable to the decisions of the Industrial Commission of Arizona, and finally, to the carrier by permitting it to deviate from an adjudicated award, said decision and those which may follow the same, administratively, have eviscerated the spirit and intent of the Arizona Worker's Compensation Act as guaranteed by *Article 18, Section 8 of the Arizona*

Constitution. Further, Petitioner herein and others similarly situated have, additionally, sustained a loss of a substantial property right without due process of law as guaranteed by the *Constitutions of the United States of America* and the *State of Arizona*.

What occurred below reflects the uneven playing field that exists between a worker's compensation carrier and the worker with regard to the administrative handling of a worker's compensation claim in the State of Arizona. Here, the parties engaged in a hotly contested series of hearings with respect to the issue of compensability of a chronic fatigue syndrome having been aggravated and made disabling by the stress of Petitioner's employment. Included in the Decision Upon Hearing issued by Judge Israel, crucial to the need for this Honorable Court to take review herein, are the following findings by Administrative Law Judge Israel:

. . .

> 14) General practitioner Brian L. Cabin, M.D., the applicant's current treating physician, testified regarding his care of the applicant since April 29, 1992. He has diagnosed chronic fatigue syndrome and has treated the applicant, providing some relief although she remains disabled. . . . He testified that she had a relapse in 1991 requiring increased treatment and a longer time for recovery, which has not yet occurred in the two-and-a-half-plus years applicant has been off work. . . .

(See Appendix B, Finding no. 14 pp. 9, 10);

> 16) Board certified rheumatologist Steven Strong, M.D. testified regarding his evaluation

> of the applicant on November 9, 1993. He diagnosed the applicant as having chronic fatigue syndrome and fibrositis, the causes of which are unknown. He testified that persons who have chronic fatigue syndrome and are placed in stressful situations are eventually nonfunctional because such people are less tolerant of stress. When asked to assume the applicant was working 60 plus hours per week, that she was interrupted on her off Wednesdays, and that she was stressed by the process of hiring her assistant, he concluded that such stress contributed to and made her chronic fatigue syndrome symptoms worse. He testified that applicant's chronic fatigue syndrome symptoms should improve if the stressors are removed but he questioned whether applicant was removed from the stressors given the litigation process. . . .

(See Appendix B, Finding no. 16, p. 11);

> 24. With regard to the physical diagnosis, chronic fatigue syndrome, both testifying physicians agreed that applicant's chronic fatigue syndrome, which pre-existed the date of injury, was obviously not caused by the applicant's work. However, they both agreed that applicants on-the-job stress aggravated her chronic fatigue syndrome. Where stress causes or, as here, aggravates and makes worse a pre-existing physical condition, it is not required that the stress be unusual, unexpected or extraordinary. See *Murphy vs. Industrial Commission of Arizona*, supra. Even though the applicant's on-the-job stress was not unusual, unexpected or extraordinary, nevertheless her on-the-job stress aggravated and made worse her chronic fatigue

> syndrome and that constitutes a compensable industrial injury . . .

(Appendix B, Finding no. 24, p. 15);

> 25) The applicant sustained a compensable aggravation of her chronic fatigue syndrome. For that aggravation only, she is entitled to temporary total and/or temporary partial disability compensation as well as medical, surgical and/or hospital benefits to the extent provided by law, from December 13, 1991 until her condition related to this accident is medically stationary . . .

These findings appear not to have been understood by Administrative Law Judge Enriquez or the Court of Appeals. Implicit in these findings were not only that there was a compensable claim, but that Petitioner continued to be disabled as a result thereof through and including at least the date of the Administrative Law Judge's Decision. How then can the carrier get away with awarding benefits only until the tenth day of November, 1993, the date of its independent medical examination with Dr. Strong which preceded the Administrative Law Judge's decision by one year? The carrier chose not to litigate Judge Israel's decision. As such, all issues that either were litigated or could have been litigated at that time became final, res judicata, and not subject to subsequent collateral attack. The Doctrine of Issue Preclusion, as well as the *Constitutions of the United States of America* and the *State of Arizona* preclude taking away an entitlement to worker's compensation benefits already established and adjudicated, without due process of law.

The Court of Appeals has totally missed the significance of its decision by finding that:

> . . . [t]he only issue the ALJ decided in that award was compensability; whether and when Casey's condition was stationary and whether she had a permanent disability were not at issue and, thus, were not decided. . . . Casey's further arguments about the carrier's termination of benefits effective November 11, 1993, were made moot by the second award, which extended benefits through November 28, 1995 . . .

It is respectfully asserted that the foregoing reflects a total lack of understanding of the Worker's Compensation Act of the State of Arizona. The decision of Administrative Law Judge Israel not only found compensability, but found ongoing temporary disability that had not subsided in the two and a half years post injury! Since both Petitioner's testifying physician and Respondent's testifying physician agreed that she was continuing to be disabled by the aggravation of her pre-existing chronic fatigue syndrome which was her industrial injury, there was no legitimate way to rule that compensability was the only issue that became final and res judicata. Since Administrative Law Judge Israel found that Applicant was in need of active medical treatment due to her industrial injury from the date thereof until stationary, then the decision also determined that her condition was not stationary and that she was in need of active medical treatment and that also became final and res judicata! There is no doubt that Respondents, had they desired to have done so, could have filed a request for review contesting

the findings of compensability and entitlement to continuing benefits.

Accordingly, the decisions below have ignored and implicitly overruled decisions of this Honorable Court such as *Talley vs. Industrial Commission*, 105 Ariz. 162, 165-66, 461 P.2d 83, 86-87 (1969) wherein it was held that the Doctrine of Issue Preclusion applies to worker's compensation proceedings and is applicable where an issue is actually litigated and necessarily determined at a prior stage. This Honorable Court's decision in *Russell vs. Industrial Commission*, 104 Ariz. 548, 553, 456 P.2d 918, 923 (1969), has likewise been overruled by implication wherein this Honorable Court ruled that uncontested determinations, including notices of claim status by an employer or a carrier are res judicata when final.

Also overruled by implication were various Court of Appeals decisions, including *State Compensation Fund vs. McComb and Industrial Commission*, 16 Ariz. App. 303, 304-305, 492 P.2d 1241, 1242-43 (1972), *Reddell vs. Industrial Commission*, 131 Ariz. 263, 640 P.2d 194 (App. 1981) and *Holmes Tuttle Broadway Ford vs. Industrial Commission*, 27 Ariz. App. 128, 130-131, 551 P.2d 577, 579-580 (1976).

In *Church of Jesus Christ of Latter-Day Saints vs. Industrial Commission*, 150 Ariz. 495, 497-498, 724 P.2d 581, 583-584 (App. 1986), the Court of Appeals indicated that the protest period applied equally to the employer and the carrier as well as the applicant. The Court of Appeals referred to this Honorable Court's decision of *Gallegos vs. Industrial Commission*, 144 Ariz. 1, 695 P.2d 250 (1985), in which it was held that once an issue had been factually determined resulting in a final findings and award, such

award may not be retroactively modified. Further, another Arizona Supreme Court decision that has been overruled, by implication, is *Green vs. Industrial Commission*, 78 Ariz. 347, 280 P.2d 268 (1955) where the Arizona Supreme Court determined that the Industrial Commission may not re-evaluate evidence originally available to it subsequent thereto and change its decision after it has lost jurisdiction over the case.

Included in the top ten list of Arizona Supreme Court decisions implicitly overruled by the Court of Appeals herein would have to be *Stainless Specialty Manufacturing Company vs. Industrial Commission*, 144 Ariz. 12, 695 P.2d 261 (1985) where this Honorable Court, en banc, held that,

> In the workers' compensation setting. the *doctrine of res judicata* operates to bar relitigation of those issues which were determined in the previous proceedings as well as those which could have been decided at the time of the original award.

The foregoing discussion quite clearly indicates that the decisions below are not only not reasonably supported by the law and the evidence, but they are inappropriately in derogation of the established law of this Honorable Court. In *McKay vs. Industrial Commission*, 103 Ariz. 191, 438 P.2d 757 (1968), this Honorable Court, en banc, held that,

> Whether prior decisions of the highest court in the state are to be disaffirmed is a question for a court which makes the decisions. Any other rule would lead to chaos in our judicial system.

Well said! The decision before this Honorable Court has created chaos with regard to the orderly administrative processing of a worker's compensation claim in the State of Arizona and the stare decisis of well-reasoned decisions by this Honorable Court and the Honorable Court of Appeals. What the Court of Appeals herein has cavalierly passed off as a final decision dealing only with compensability has by the short-sightedness of its gaze shaken the very foundations of the Worker's Compensation Act of this State and the decisions of the appellate courts attempting to create some finality in the administrative handling of claims and the establishment of a more level playing field between the parties. In one fell swoop, the Industrial Commission and the Court of Appeals has reduced the orderly administration of justice to chaos.

This is indeed a case of first impression before this Honorable Court. Unless this Honorable Court reviews this case, the law of res judicata will apply only against the worker. A carrier which denied compensability and failed to protest an administrative law judge decision finding compensability and continuing entitlement to disability and medical benefits, may now go behind the final award of the Administrative Law Judge and terminate benefits retroactively prior to the date of the Administrative Law Judge's decision. If this is correct, then the entire hearing system is a farce as the carrier will only be bound by those portions of a final and res judicata decision of which it decides to be bound. Certainly the worker has no similar options as the worker is clearly bound by all issues that were or could have been litigated prior to the entry of the award. If this decision is permitted to remain,

the spirit and intent of the *Workers' Compensation Act of the State of Arizona* as guaranteed by *Arizona Constitution Article 18, Section 8,* and the due process clauses of the *United States* and *Arizona Constitutions* will have expired. Once an adminsitrative law judge has held that a worker is entitled to continuing benefits based upon a compensable claim and that award is allowed to become final without protest, it cannot be subject to later modification at the whim of the carrier or else chaos will indeed exist.

Novel also in terms of not having been raised previously before this Honorable Court is the inappropriate determination that the retroactive termination of benefits was rendered moot by the more recent administrative law judge's determination which extended benefits through the date of the subsequent administrative law judge decision in the case subjudice. This naive assertion by the Court of Appeals reflects a lack of understanding of the administrative handling of a worker's compensation claim in this state. When the carrier decided to reduce the entitlement to Petitioner, arbitrarily, to something less than what it should have paid under the Israel award, it became necessary for Petitioner to re-involve her attorney and relitigate, in essence, an issue that had already been litigated and adjudicated. This now has upset the sanctity of the earlier final award and fostered further litigation for which the applicant must incur additional expense, attorney's fees and delay. Once her entitlement to benefits had been adjudicated, Petitioner herein should have been placed in the security of an established status rather than immediately replacing her on the parapets of further litigation which, according to Respondents' own physician, probably is responsible to some great degree for the

continuation of her disability long after she had been removed from the stressful aspects of her employment. Respondent Carrier has therefore reinjured this Petitioner by causing her additional stress which, in turn, has interfered with her rehabilitation and extended the effects of her industrial injury beyond a point which may well have been anticipated had she not been resubmitted to this stress.

Petitioner herein, in order to try to preserve her entitlement to continuing benefits was required to not only file a request for hearing with regard to Notice of Claim Status issued on March 15, 1995 which terminated her benefits retroactively to November 11, 1993, but she was also obliged to file a request for relief pursuant to the provisions of *A.R.S. §23-1061(J)* due to the inappropriate termination of benefits and to lodge a complaint of bad faith and improper claims processing. All of the above require substantial preparation and legal expense and the financial wherewithal to engage in these processes having been retroactively taken away from Petitioner, placed further stress upon her attempt to save what was rightfully hers.

The final point that this Honorable Court should consider is the fact that the Court of Appeals, again in cavalier fashion, determined that the entirety of the issues, including entitlement to continuing benefits, retroactive termination and bad faith and unfair claims handling were all somehow rendered moot by the fact that Administrative Law Judge Enriquez extended temporary disability benefits to the date of the subsequent examination by Dr. Strong on November 28, 1995. The excerpts of the testimony of Dr. Strong selected by the Court of

Appeals in its decision hardly presented a fair analysis of the testimony of this physician. Had the Court of Appeals gone further, it would have realized that the upshot of the testimony of Dr. Strong was that he was not in a position on November 28, 1995, to declare her condition stationary as she was still experiencing the effects of the chronic fatigue syndrome as aggravated by her industrial injury when he saw her on that date. Rather than expand the contents of this document, Petitioner hereby attaches as Appendix F hereto and, by this reference hereof for all purposes, incorporates pages 6 through 14 of Petitioner's Opening Brief as directly contrary to the selective statement chosen by the Court of Appeals and the comparison shows that the Court of Appeals erred again in finding all issues to have been rendered moot by the extension of benefits of the Enriquez award. Since there was no medical evidence to support a termination of benefits with no disability, these issues are not moot and the awards are not supported by the law and the evidence!

F. CONCLUSION

This is the first of a number of cases of which the undersigned is familiar that will present to this Honorable Court the very important issue of whether or not the carrier may choose not to contest an adverse award of compensability and continuing benefits and then retroactively terminate benefits prior to the final award, at its whim. The procedure itself creates such an uneven playing field in the worker's compensation claims administration arena that the worker may well be better off returning so the Superior Court for direct litigation

against the employer as the trade-off for worker's compensation benefits has become a joke.

It can hardly be deemed within the spirit and intent of the Worker's Compensation Act to permit the only party with the position of power to initiate and terminate benefits, at its whim, regardless of what has been held or could have been litigated in the past. Unless the system works equally for the Worker as it does for the carrier, there is a substantial denial of due process of law to a class granted social litigation to be liberally construed in its favor.

Not only should this Honorable Court take review of this Petition for this case, but to frustrate such administrative improprieties in the future and to emphasize the granting of said Petition, this Honorable Court should award Petitioner a reasonable attorney's fee, statutory damages for bad faith and improper claims handling, and such other and further relief as to this Honorable Court shall appear proper in the premises.

RESPECTFULLY SUBMITTED this 20th day of February, 1997.

RABINOVITZ & ASSOCIATES, P.C.

By: /s/ Bernard I. Rabinovitz
Bernard I. Rabinovitz
Attorney for Petitioner

AFFIDAVIT OF MAILING

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Marilyn Rubin, certifies that on the 20th day of February, 1997, she caused to be delivered by messenger, an original and six copies of the foregoing PETITION FOR REVIEW to:

Joyce Goldsmith, Clerk
ARIZONA COURT OF APPEALS,
DIVISION TWO
400 West Congress Street
Tucson, AZ 85701

and personally mailed two copies to:

Anita Valainis, Chief Counsel
INDUSTRIAL COMMISSION OF ARIZONA
LEGAL DEPARTMENT
P.O. Box 19070
Phoenix, AZ 85005-9070

Don Cross, Esq.
Cross & Lieberman
2800 N. Central, Suite 1725
Phoenix, AZ 85004-1048

/s/ Marilyn Rubin
Marilyn Rubin

Subscribed and sworn to before me this 20th day of February, 1997.

/s/ Velia Armendarez
NOTARY PUBLIC

My Commission Expires: Aug. 4, 1999

APPENDIX K

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

IMPORTANT – Read information on reverse side before completing this Request. This Request must be completed in detail and additional pages may be used if necessary

REQUEST FOR HEARING

JAN R. CASEY
Applicant,

vs.

ARIZONA MAIL ORDER
Defendant Employer,

LIBERTY MUTUAL
Defendant Insurance Carrier

Social Security No. 497-46-0745

ICA Claim No. 92352-252049

Ins. Carrier Claim No. C609-085340

Date of Injury 12/13/91

COMES NOW APPLICANT, BY AND THROUGH HER ATTORNEY UNDERSIGNED
(Party Requesting Hearing)

and pursuant to A.R.S. Section 23-941 and in accordance with Rules 35, 36, 41, 47 and 55 of the Rules of Procedure Before The Industrial Commission of Arizona, the texts of which appear on the reverse hereof, requests a hearing on the: (Check appropriate box)

(XX) **Notice of Claim Status Issued by the** DEFENDANT INSURANCE CARRIER, LIBERTY MUTUAL

or

( ) **Notice, Award, Order or Decision entered by the Industrial Commission of Arizona,**

on MARCH 15 , 1995 , which is arbitrary, unjust, unlawful and not supported by the evidence for the following reasons: (State in detail why you feel you are aggrieved)

PLEASE SEE ATTACHED ADDENDUM

Hearing requested at city of town of TUCSON Estimated length of time for hearing 1/2 day

Number of witnesses TO BE DISCLOSED AT THE APPROPRIATE DEADLINE TIMES

Pursuant to Rule 35, the party hereby requests that subpoenas be issued to the following witnesses:

* * *

WHEREFORE, it is requested that a time and place be fixed for hearing. The undersigned hereby states that he/she has read the matters contained on the reverse side of this Request for Hearing prior to completing same.

DATED the 25th day of April , 1995 RABINOVITZ & ASSOCIATES, P.C.

/s/ Bernard I. Rabinovitz
Bernard I. Rabinovitz

Signature at Party or Authorized Representative

P.O. BOX 41600
Party's Address:

TUCSON, AZ 85717
City **State** **Zip**

cc: Attorney Don Cross
cc: Liberty Mutual/Phoenix
cc: Presiding ALJ – Tucson
cc: Chief ALJ/Eileen Willett
Phoenix, ICA
cc: Ms. Karen Hamilton/ICA-Phoenix

IMPORTANT – Read information on reverse side before completing this Request for Hearing. This Request for Hearing must be completed in detail and filed at an office of The Industrial Commission of Arizona.

REQUEST FOR HEARING ADDENDUM

Re: JAN R. CASEY
ICA Claim No.: 92352-252049
S.S. No.: 497-46-0745
Claim No.: C609-085340
D/Injury: 12/13/91
EMPLOYER: ARIZONA MAIL ORDER

This March 15, 1995 Notice of Claim Status improperly attempts to terminate worker's compensation disability and medical benefits retroactively more than thirty days prior to this notice, and is therefore incorrect and unlawful; further, the Notice of Claim Status improperly attempts to go behind a final and res judicata Administrative Law Judge Decision, and in so doing, the carrier herein has improperly invaded the jurisdiction of the Arizona Industrial Commission and exceeded its own jurisdiction. Further, arguendo, the Applicant alleges that the industrially related condition is not stationary; that the Applicant continues to be disabled as a result of the industrial injury in question and is entitled to continuing temporary total and/or temporary partial disability compensation benefits and/or that the condition is not stationary, and/or if it is, that the Applicant has sustained a permanent disability as a result of the industrial injury in question.

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

JAN CASEY, Applicant, v. ARIZONA MAIL ORDER, Defendant Employer, LIBERTY MUTUAL, Defendant Insurance Carrier.	S.S. No.: 497-46-0745 ICA No.: 92352-252049 Carrier No.: C609-085340 D/Injury: 12/13/91 **REQUEST FOR 1061(J) RELIEF** (Assigned to Judge Israel)

COMES NOW the Applicant herein by and through counsel undersigned, and respectfully prays the Industrial Commission of Arizona to investigate what has become a continuing attempt on the part of carriers herein to go behind final and res judicata determinations of compensability by the presiding Administrative Law Judges. These attempts reduce the benefits by arbitrarily selecting a date prior to the issuance of the decision of the Administrative Law Judge and paying benefits only up to and including that date. Consequently, the res judicata finding of the Administrative Law Judge that the Applicant is entitled to temporary total and/or partial compensation benefits and active medical treatment until such time as the Applicant's condition related to the industrial injury may be deemed stationary is totally ignored.

In the instant case, the decision of the Administrative Law Judge was entered on the 11th day of October, 1994, and contained a finding substantially similar to the foregoing. The judge affirmed his initial Decision Upon

Review on the 15th day of December, 1995. A Request for Special Action-Industrial Commission, was never filed, yet the carrier paid benefits from December 13, 1991 through November 10, 1993, a date which is substantially prior to the date of the decision of the Administrative Law Judge which became final and res judicata.

The Carrier has taken the position that since the issue before the presiding Administrative Law Judge was compensability, and not continuing benefits and/or permanent disability, that the Findings and Award of the Administrative Law Judge indicating the entitlement to continuing benefits is not binding upon it since the issue was not specifically litigated.

In the instant case, as in others to be separately discussed, a Notice of Claim Status is then issued subsequent to the finality of the Administrative Law Judge decision, which retroactively terminated compensation and medical benefits effective the date of the independent medical examination which, in this case, was issued 11 months prior to the issuance of the now final Administrative Law Judge determination.

It is respectfully asserted by the Applicant herein that this process is a direct attempt to undercut awards of the Administrative Law Judges of the Arizona Industrial Commission, and is further in violation of the Rules of Procedure of this jurisdiction prohibiting the termination of benefits more than thirty days retroactively. (See R4-13-118).

Since this is not an isolated instance but a clearly calculated attempt on the part of the carrier herein and others similarly situated, to foster unnecessary additional

litigation and to openly ignore the sanctity of final decisions of the Administrative Law Judges of the Industrial Commission of Arizona, the Applicant herein respectfully prays the Industrial Commission of Arizona to not merely refer this matter to hearing which will likely be consolidated with a Request for Hearing filed with reference to the subsequent Notice of Claim Status, but to directly investigate this matter and request those carriers engaging in this procedure to show cause why this practice should not be stopped immediately with retroactive benefits awarded to the Applicant. Further, should this practice persist, to show cause why this carrier and those acting similarly should not be prevented from selling, adjusting, or in any manner, being involved with the worker's compensation insurance program in effect in the State of Arizona.

It is further the allegation of the Applicant herein that the persistence of the carrier herein in denying benefits previously adjudicated is bad faith and entitles this Applicant to appropriate sanctions including, but not limited to, interest upon said benefits and a reasonable attorney's fee.

WHEREFORE, the Applicant herein respectfully prays the Industrial Commission of Arizona to examine the failure of the carrier herein to provide benefits as ordered by final and res judicata decision of an Administrative Law Judge of the Industrial Commission of Arizona and grant the relief prayed for hereinabove.

RESPECTFULLY SUBMITTED this 25th day of April, 1995.

RABINOVITZ & ASSOCIATES, P.C.

By: /s/ Bernard I. Rabinovitz
Bernard I. Rabinovitz
Attorney for Applicant

ORIGINAL/COPY of the foregoing mailed/delivered this 25th day of April, 1995, to:

The Honorable Gary Israel
Industrial Commission of Arizona
2675 East Broadway Blvd.
Tucson, Az 85716

COPY of the foregoing mailed this 25th day of April, 1995, to:

Don Cross, Esq.
O'Connor, Cavanagh
One S. Church Ave., #2200
Tucson, AZ 85701-1621

Department of Insurance of the State of Arizona
400 W. Congress, Suite 152
Tucson, AZ 85701

The Honorable Eileen Willett
Chief Administrative Law Judge
Industrial Commission of Arizona
P.O. 19070
Phoenix, AZ 85007-2922

Presiding Administrative Law Judge
Industrial Commission of Arizona
2675 E. Broadway
Tucson, AZ 85716

Chief Counsel of the State Compensation Fund
of the State of Arizona
P.O. Box 33069
Phoenix, AZ 85067-3069

Liberty Mutual
Attn: Jim Walsh
P.O. Box 52037
Phoenix, AZ 85072-2037

Jan Casey
625 East North Street
Tucson, Arizona 85705

(2)

Supreme Court, U.S.
FILED
OCT 29 1997
CLERK

No. 97-547

In The

Supreme Court of the United States

October Term, 1996

JAN CASEY,

Petitioner,

vs.

ARIZONA MAIL ORDER,

Respondent,

INDUSTRIAL COMMISSION OF ARIZONA/LIBERTY MUTUAL INSURANCE COMPANY,

Respondent Party in Interest.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona Division Two

BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA MAIL ORDER AND LIBERTY MUTUAL INSURANCE COMPANY

DONALD L. CROSS
Counsel of Record
LISA M. ASHBROOK
CROSS & LIEBERMAN, P.A.
Attorneys for Respondents Arizona Mail Order and Liberty Mutual Insurance Company
2800 North Central Avenue
Suite 1725
Phoenix, Arizona 85004-1048
(602) 650-2856

72335 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

1398

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent Arizona Mail Order, Inc. is a privately held Arizona Corporation with no parent companies or nonwholly owned subsidiaries.

The following is the parent of Respondent Liberty Mutual Insurance Company: Liberty Mutual Group, Corp. There are no nonwholly owned subsidiaries of Respondent Liberty Mutual Insurance Company.

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Powell v. McCormack, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) 8

Hall v. Beals, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969) 9

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A.R.S. § 23-1061(J) 2

United States Constitution Cited:

Fourteenth Amendment 1

STATEMENT OF THE CASE

This Petition seeks this Court's review of January 27, 1997 Memorandum Decision of the Arizona Court of Appeals, Division Two. The Arizona Supreme Court denied review of this matter on June 26, 1997. Petitioner claims that the Due Process Clause of the Fourteenth Amendment to the United States Constitution was violated when a worker's entitlement to compensation benefits awarded in a final decision of an Administrative Law Judge on an issue of compensability were thereafter inappropriately retroactively terminated. Additionally, where the award of the Industrial Commission vacated the termination and extended the time period of entitlement to benefits, there is a question as to whether this issue is moot. (Pet. i).

As detailed below, there is no basis or cause for this Court's review of this contention, a contention which has now been rejected by the Industrial Commission of Arizona, the Arizona Court of Appeals and the Supreme Court of Arizona. By substituting emotive verse about those "whose rights will likely be trampled upon" and the like (Pet. 11) for an accurate description of the underlying facts, the Petitioner has attempted to create the appearance a justiciable issue where none in fact exists.

Petitioner filed a claim for worker's compensation benefits for a gradual injury consisting of a work related aggravation of a pre-existing non-industrial chronic fatigue syndrome. Respondents denied the compensability of the claim. Following hearings, the Industrial Commission issued its Decision Upon Hearing and Findings and Award for Compensable Claim on October 11, 1994 (Pet. App. D) which found Respondents liable only for an aggravation of the pre-existing non-industrial condition. (Pet. App. D17-D18).

The only issue before him and decided by the Administrative Law Judge at the time the 1994 decision was issued was the compensability of the claim of injury, the "injury by accident" being defined as work related stress having caused an aggravation of the Petitioner's pre-existing, non-industrially related chronic fatigue condition. No findings were made as to whether the Petitioner's condition was stationary, the time periods of entitlement to medical and/or temporary compensation benefits, or whether the Petitioner was permanently impaired at the time of hearings and rendition of the decision.

After the Petitioner's claim was found compensable by the October 11, 1994 Decision Upon Hearing, it became the Respondents' responsibility to process and administer the Petitioner's claim in accordance with the Arizona Worker's Compensation Act (Title 23 of Arizona Revised Statutes). Respondents paid medical and temporary compensation benefits and by a Notice of Claim Status dated March 15, 1995, terminated Petitioner's active medical treatment without a permanent disability effective November 11, 1993, all pursuant to an evaluation conducted by Steven Strong, M.D. performed on that date.

The Petitioner filed a Request for Hearing on April 25, 1995 protesting the closure of her claim for benefits. Additionally, Petitioner filed a request for relief pursuant to A.R.S. § 23-1061(J) on April 25, 1995. The 1061(J) request demanded the Industrial Commission of Arizona set a hearing, "to examine the failure of the carrier herein to provide benefits as ordered by the final and *res judicata* decision of an Administrative Law Judge of the Industrial Commission of Arizona." (Pet. App. K).

Hearings were held on the issues presented and on May 20, 1996, the ALJ issued a Decision Upon Hearing and Findings

and Award for Temporary Disability Benefits. (Pet. App. C). Pursuant to this award the ALJ resolved a conflict in medical opinion and accepted the opinions and testimony of Dr. Strong as being the most probably correct and well founded. He concluded that the industrial aggravation of Petitioner's pre-existing chronic fatigue syndrome was at that time stationary. (Pet. App. C). This Decision Upon Hearing also extended the Petitioner's entitlement to active medical treatment and temporary disability compensation benefits for an additional two years through November 28, 1995, the date upon which Dr. Strong re-evaluated the Petitioner and concluded that her condition was stationary without permanent impairment with respect to any aggravation resulting from the stress of the work, the aggravative effects of same having ended at some point in time during the intervening four year time period between the date of injury and his second evaluation of the Petitioner.

Even though the Respondents initial attempt at closure was invalidated by the Industrial Commission and she had been granted two years of additional medical and compensation benefits, Petitioner was apparently not satisfied and filed a timely Petition for Special Action-Industrial Commission before Division Two of the Arizona Court of Appeals which resulted in the entry of a Memorandum Decision affirming the award below. (Pet. App. A). Petitioner then filed a timely Petition for Review in the Arizona Supreme Court. Review was denied by the Arizona Supreme Court on June 26, 1997. (Pet. App. B).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE INDUSTRIAL COMMISSION OF ARIZONA WHICH WAS AFFIRMED BY THE ARIZONA COURT OF APPEALS INVOLVES NEITHER A RETROACTIVE TERMINATION OF BENEFITS NOR ISSUES OF *RES JUDICATA* AND CONSEQUENTLY DOES NOT EVEN REMOTELY INFRINGE UPON THE DUE PROCESS RIGHTS OF THE PETITIONER.

Petitioner's contention that issues of *res judicata* or retroactive termination are triggered by the Industrial Commission award relating to compensability is wholly unfounded. What Petitioner fails to grasp is that the only issue decided by the Administrative Law Judge in the October 1994 decision was the compensability of her claim. No findings were made as to whether the Petitioner's condition had become stationary or whether the Petitioner was permanently impaired. Accordingly, the doctrines of *res judicata* or retroactive termination are not germane to this matter. The Petitioner cites numerous cases regarding the importance of the doctrine of *res judicata* and its failure to be applied. However, the Petitioner has failed to recognize that the Industrial Commission of Arizona, the Arizona Court of Appeals and the Supreme Court of Arizona have all found that *res judicata* was not applicable to the instant situation.

The Petitioner seems to think that the October 11, 1994 Decision Upon Hearing and Findings and Award for Compensable Claim automatically entitled her to lifetime benefits for her pre-existing non-industrial chronic fatigue syndrome. This is a greater entitlement than either factual reality

or the law dictate. The Decision Upon Hearing placed neither a minimum nor a maximum time limit on the Petitioner's need for active medical treatment. It was properly left to the Respondents to administer the Petitioner's claim after it was found to be compensable and to make the preliminary determinations as to when the medical evidence supported a conclusion that Petitioner's condition was stationary and whether there was any industrially related permanent impairment.

The Administrative Law Judge's 1994 compensability decision was neither a statement of nor did it in any way address the issues of the duration of active medical treatment, whether or not the Petitioner's condition was stationary, and if so, whether she had a permanent disability. None of those issues were before the Administrative Law Judge at the time of the litigation regarding the compensability of Petitioner's claim and accordingly, no decision regarding them was made. As such, after the finding of compensability became final, Respondents were completely within their rights to act to terminate benefits in a fashion and at a point in time they deemed appropriate based upon the evaluation of Dr. Strong.

Perhaps most significantly, ***Respondent's attempt at closure based upon Dr. Strong's initial evaluation, an evaluation which took place two (2) years after the claimed injury, was invalidated by the subsequent Decision Upon Hearing which Petitioner is now challenging***. As such, even if it were established that an issue ever existed as to an alleged retroactive termination, something which Respondents do not concede, this was resolved *in favor of the Petitioner* in the subsequent Decision Upon Hearing. Based upon the evidence presented at the closure issue round of hearings, the Respondent's initial termination was invalidated by the Administrative Law Judge, who awarded the Petitioner medical and temporary disability compensation benefits for an additional two years through November 28, 1995,

well past the date of the initial compensability decision. Consequently, Petitioner has based her entire Petition for Writ of Certiorari on a non-issue.

Respondents have reviewed every case cited by Petitioner in her Petition for Writ of Certiorari. Respondents do not consider any of these cases to be even remotely on point nor do any of them support the Petitioner's contention that the Industrial Commission Award in the instant case amounts to an unconstitutional taking of property. Any "retroactive termination" which was arguably attempted by the Respondents was subsequently invalidated by the Industrial Commission in its entirety.

Petitioner further cites what she deems to be "conflicting decisions" of other jurisdictions on these issues and claims a need for uniformity. Respondents are caused to wonder how uniformity is to be achieved in a situation in which each state is responsible for implementing and administrating its own worker's compensation system pursuant to the laws of each individual state. No two systems are exactly identical. A review of the cases cited by the Petitioner such as *Gusler v. Therview Tubulor Products*, 412 Mich. 270, 315 N.W. 2d 388 (1981) and *K & L Trucking Company v. Thurber*, 1 Va. App. 213, 337 S.E. 2d 299 (1985), reveals that these cases were decided based upon the specific law and procedures pertaining to each state's specific system. Further, none of these cases deal with the termination of benefits following entry of a litigated compensability decision, nor do they hold that *res judicata* is applicable in that instance.

Supreme Court jurisdiction in this instance is governed by 28 U.S.C. § 1257. That section describes the types of situations which may only be reviewed by the Supreme Court of the United States by Writ of Certiorari. It provides that final judgments rendered by the highest court of a state in which a decision can

be had, the validity of a treaty or statute of the United States, the validity of a state statute on the ground of its being repugnant to the constitution, treaties or laws of the United States, or any title, right, privilege or immunity especially set up or claimed under the constitution, treaty, statutes of or commission held or the authority exercised under the United States. Respondents submit that the issues presented to the Supreme Court by the Petitioner involve no such questions. Neither federal law nor the United States Constitution is called into question by Petitioner's Writ. Additionally, there is no argument on behalf of the Petitioner that the state statutes and rules governing worker's compensation proceedings are repugnant to the Constitution. Instead, Petitioner asserts that the carrier's conduct was inappropriate and unconstitutional. Again, this allegedly unconstitutional conduct on the part of Respondents was rejected and their action in terminating benefits was overturned by the Industrial Commission of Arizona.

Petitioner concludes her argument with an emotional plea that this Court do justice to a situation where constitutional rights have been denied by a state agency, the Industrial Commission of Arizona. Respondents must ask exactly what rights have been denied? Petitioner obtained a favorable compensability determination following litigation and then received approximately four years of active medical treatment and temporary compensation benefits before her claim was terminated based upon the recommendation of an examining physician. The only thing which the Petitioner has been denied is her self-created expectation of an entitlement to lifetime benefits, something which the Constitution neither promises nor supports.

II.

EVEN IF A LEGITIMATE ISSUE OF RETROACTIVE TERMINATION HAD EXISTED, THIS ISSUE WAS RENDERED MOOT BY THE DECISION OF THE INDUSTRIAL COMMISSION WHICH EXTENDED PETITIONER'S BENEFITS THROUGH THE DATE OF THE SECOND DECISION.

A moot case is one whose resolution will not alter the legal rights of the parties. Mootness is based on the proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413, 415 (1971). The inability of the federal judiciary "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 496 n.7, 89 S. Ct. 1944, 1950 n.7, 23 L. Ed. 2d 491, 497 n.7 (1969).

Clearly, the issue presented to the Court cannot affect the rights of the Petitioner in this case. Even if this Court were to determine that the Respondents had engaged in inappropriate retroactive termination of benefits, this has already been remedied by the Industrial Commission's decision. Such a finding would not entitle the Petitioner to any additional benefits.

Petitioner further argues that this issue should be determined regardless of its alleged mootness because it involves an issue regarding a practice which is "capable of repetition yet evading review." Respondents acknowledge that this is one exception to the mootness doctrine, but consider it to be inapplicable to the instant situation. In order for an issue to fit within this exception, the situation must be one that is capable of repetition with respect

to the individual Petitioner. *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969). The *Hall* case involved the Petitioners' challenge of Colorado's six month residency requirement before being allowed to vote. Petitioners moved to Colorado five months before a general election and filed suit. By the time this matter reached the Supreme Court, the issue was rendered moot because by that time Petitioners had satisfied the six month residency requirement. The Court found that this matter was capable of repetition only if the Petitioners moved out of Colorado and then attempted to move back. This was held to be too speculative to fall within the "capable of repetition" exception.

Similarly, the instant situation would only be capable of repetition with respect to the Petitioner if she ever suffered another industrial injury which was denied, litigated, deemed compensable, and then terminated as of a date prior to the compensation determination. Given the fact that the Petitioner has not worked in the five years since this industrial injury and has no apparent intention of returning to work, the likelihood of this every happening again is similarly too speculative.

Further, even if this situation were capable of repetition, it is not likely that it would evade review. Respondents draw the courts attention to *DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974). This matter involved a Plaintiff's challenge of a law school's admission policy. Pending the litigation, the Plaintiff was admitted and attended law school. By the time the matter reached the Supreme Court the Plaintiff finished law school, thereby rendering the challenge moot. The Supreme Court held that this situation was not capable of evading review since the law school's admission policies were unchanged and there was every reason to believe that any other person could attack the policy and come before the Court in the same manner. Similarly, the instant situation is not likely to evade review in the future.

CONCLUSION

Petitioner's constitutional challenge of the Industrial Commission's Award is both meritless and nonsensical. There was no retroactive termination in the instant case. Assuming *arguendo* that there were, it was nullified by the Industrial Commission's Decision Upon Hearing. Petitioner essentially received an Industrial Commission decision which was completely in her favor in terms of the issues she raises, yet she continues to challenge that award. Any potential basis for challenge, if present, was rendered moot by the Industrial Commission decision.

For the reasons given above, the Petition should be denied.

Respectfully submitted,

DONALD L. CROSS
Counsel of Record
LISA M. ASHBROOK
CROSS & LIEBERMAN, P.A.
Attorneys for Respondents
Arizona Mail Order and Liberty Mutual Insurance Company
2800 North Central Avenue
Suite 1725
Phoenix, Arizona 85004-1048
(602) 650-2856